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SKETCHES

OF THE

JUDICIAL HISTORY

OF

MASSACHUSETTS

FROM 1630 TO THE REVOLUTION IN 1775.

BY EMORY WASHBURN.

——— "Copy fair what time hath blurred,
Redeem truth from his jaws."—*Herbert.*

BOSTON:
CHARLES C. LITTLE AND JAMES BROWN.
1840.

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TO THE

LEGAL PROFESSION

IN MASSACHUSETTS,

This work, designed, among other things, to illustrate the dependence of a free People, for an impartial administration of justice and the security of personal rights, upon the labors of an honorable, enlightened and independent Bar—is respectfully inscribed by their humble associate,

The Author.

PREFACE.

The design of the following work, may be very briefly explained.—Neither the hope of fame nor expectation of profit entered into the considerations which have induced to its preparation or publication.

When entering upon the study of the profession, with the pursuit of which my success in life was to be identified, a curiosity was awakened to learn something of its history in our own Commonwealth. But to inquiries upon the subject, I found little that was satisfactory. The ordinary sources of historical information furnished little from which the systems of judicature or the forms and changes of judicial process in Massachusetts, could be learned; and while the actors in the events of its political, ecclesiastical and military history had been remembered, comparatively most of those who had taken part in the administration of justice had been forgotten.

So obscure was this department of our history found to be, that nothing but an elaborate research seemed adequate to a satisfactory development of its details.

With a view of discovering these, and without the remotest idea of preparing a work for publication, I entered upon the investigation of the early judicial history of Massachusetts, and of

the names and characters of those who had been connected with the administration of justice here.

These were sought, among other sources, in the general and local histories which had been published, the compilations of biographical notices, the records of courts and the state archives, and the reminiscences and collected facts which were furnished by individuals whose aid had been solicited in the enterprise.

These investigations however, were chiefly confined to Massachusetts, independent of the colony of Plymouth before its union with Massachusetts Bay. Nor can this be regarded as an omission of any importance, since the work of Mr. Baylies so fully supplies the history of the former colony.

The work now dedicated to the profession, is the result of these investigations.

If the facts which are here collected, shall hereafter be wrought, by other hands, into a form which shall give to the legal and judicial history of this Commonwealth an interest, in the public mind, proportionate to its importance, the purposes of this publication will have been answered.

Candor however requires, that the general reader should be apprised that he will find little to interest him in the following pages.

The field, it is true, was almost untrodden, but little has been gathered from it with which to gratify taste or give pleasure to the man of letters.

If in endeavoring to snatch from oblivion, the names of some of the early Judges and Lawyers of Massachusetts Bay, I have not been actuated by as high purposes as OLD MORTALITY, in chiseling out the inscriptions upon the monuments of the slaughtered Presbyterians of Scotland, I have found many of them no less obscured from the eye of the inquirer, than the moss-covered

memorials of those whose deeds and whose virtues that devoted antiquary was seeking to restore.

I claim nothing for these Sketches, but a diligent endeavor to collect facts, and a faithful exhibition of what seemed to be historical truths.

Although few of the authorities which have been consulted are cited in the work, nothing has been meant to be stated that is not fully sustained by satisfactory evidence of its truth.

To those who know the labor of such researches, I need not—to others, I could not explain the difficulties which are inseparable from such an undertaking.

Such as it is, I offer the work for the use of those whose curiosity may lead them to inquire into the facts of which it purports to treat, in the hope that the labors of others or my own leisure may hereafter correct its inaccuracies and supply its defects.

WORCESTER, 1840.

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SKETCHES

OF THE

JUDICIAL HISTORY OF MASSACHUSETTS.

CHAPTER I.

The Legislative and Executive Departments of the Colonial Government from 1630 *to* 1684.

The Colony of Massachusetts, like that of Plymouth, owed its final success to the untiring religious zeal and unconquerable love of freedom of those who planted it. But its origin may be traced to a design of establishing in the new world a trading community upon a plan similar to that of the East India Company, for which a patent had been previously granted.

The plan as devised, regarded only the management of the business of a limited corporation, but it assumed, the moment it was carried into effect, the character of a civil, religious and political community.

The colonists derived the right of domain over the soil from the crown of England, through one of the two companies, to whom, with a sweeping grant, the continent of America between the latitudes of 34 and 45, had been divided by a royal charter. The southern portion of this territory was

appropriated to the London Company, as they were called, while the northern part of it was assigned to the other, called the Plymouth Company. These grants were made in 1606 by James I., who then occupied the throne of England.

In 1628 the council of the latter company, which had been created into a new corporation in 1620 by a patent from the king, conveyed to Sir Henry Roswell and five associates who resided in the vicinity of Dorchester in England, the territory extending from three miles north of the Merrimac to three miles south of the Charles river, and the tenure by which it was to be held (for nothing but a title to the soil passed by the grant,) was that of "free and common socage as of the manor of East Greenwich in Kent."

This was not done, however, till the original company, having become discouraged by their abortive attempts to plant colonies within its territory, had abandoned their original design.

The associates of Sir Henry Roswell in this purchase were Sir John Young, Thomas Southcote, John Humphrey, John Endicott and Simon Whitcomb. It was, however, through the influence of the Puritans in England that the colony of Massachusetts Bay was at last settled. The persecutions which English nonconformists had been suffering through the two previous reigns of Elizabeth and James, and which, under Laud, had become more intolerable than ever, led them to look for some refuge from the pitiless storm to which they were exposed at home. Mr. White, a nonconformist minister of Dorchester, engaged actively in accomplishing this object, and his attention was turned towards New England as a place of retreat and safety. Through his influence, the patentees of Massachusetts became acquainted with several leading men among the

dissenters in and near London, and an association was formed whereby three of the original patentees sold their interest in the patent to five other associates who became its proprietors in connexion with the remaining original patentees. The names of these associates were John Winthrop, Isaac Johnson, Matthew Cradock, Thomas Goff and Sir Richard Saltonstall. (1 Holm. 193.) Others, however, were immediately associated in the enterprise, for at the first election of officers of the company, a Governor, Deputy Governor and eighteen Assistants were chosen.

Roswell, Young and Southcote withdrew from the company, and in the summer of 1628 Endicott was sent over with a small colony and began a plantation at Salem.

As the Patent from the Plymouth Company only conferred a right to the soil of the territory, it became necessary, to govern the affairs of any colonies which the patentees and their associates might establish, that they should have a royal charter of incorporation. With an inconsistency not easily accounted for, Charles I. conferred upon the company a charter very liberal in its terms, and seems to have forgotten, for a moment, the hostility which he had hitherto manifested towards this persecuted sect of Christians. The charter thus granted bears date March 4, 1628, corresponding to the 15th of March 1628 in the computation of time under the "new style," adopted in 1752.

By this charter a corporation was created by the name of "the Governor and Company of the Massachusetts Bay in New England," and twenty-six persons were named in it as the patentees to whom it was granted.

As this charter was the basis upon which the government of Massachusetts rested for more than half a century, it becomes necessary to analyse the powers it conferred

upon the corporation, in order to see how far the legislative and judicial branches of the colonial government, as afterwards established, conformed to the provisions which it contained.

In the first place, the officers of the corporation were to consist of a Governor, Deputy Governor and eighteen Assistants, and these were to be chosen by the freemen annually, at the General Court which was to be holden on the last Wednesday in Easter Term. The General Courts were to consist of the Governor, Assistants and Freemen, and were to be holden four times in each year, at which freemen were to be admitted, officers chosen, and laws and ordinances enacted.

Besides these General Courts, there were to be monthly courts, held by the Governor, or, in his absence, the Deputy Governor and at least seven Assistants, "for the handling, ordering and dispatching of all such businesses and occurrences as should from time to time happen touching or concerning said company or plantation." The nature and extent of the power of legislating for the company which was delegated to the General Court by the charter, were to establish all manner of wholesome orders, laws, statutes and ordinances, "as well for settling the forms and ceremonies of government and magistracy," "and for naming and settling of all sorts of officers needful for the government and plantation," as also for "imposition of lawful fines, mulcts, imprisonments or other lawful correction, *according to the course of other corporations* in this our realm."

The Governor and, in his absence, the Deputy Governor was authorized to call all meetings of the company, and either the Governor or Deputy Governor was to be present at the General and Monthly Courts.

From this abstract of the charter it will be seen, in the

limited and undefined powers that it conferred upon the company, how little the king or the company anticipated the springing up of a republic in this western wilderness whose civil and social relations should become as complex and wide-spread as those of the colony of Massachusetts were found to be within a few years after it was planted. The powers and privileges of the charter were conferred, as stated by that instrument, in order that "the inhabitants there may be so religiously, peaceably and civilly governed, as their good life and orderly conversation may win and incite the natives of the country to the knowledge and obedience of the only true God and Savior of mankind, and the Christian faith which, in our royal intention and the adventurers free profession, is the principal end of this plantation."

It was, in fact, designed that the corporation should exist in England, and that colonies should be sent out like that at Salem, while the officers of the company should continue to be elected and to reside in England. Nothing is directly said in the charter in regard to establishing Judicatories, nor does it recognize a judicial system of any kind beyond the mention that is made of Magistrates. It never could have been anticipated by the framers of that instrument, that within a few years a complete system of judicial and executive powers would have sprung up in the colony, independent, in effect, of the mother country, and which though assuming a novel form, was yet well adapted to the primitive wants, and condition of a prosperous and enterprizing community.

At the first meeting of the corporation which was held in London, Matthew Cradock who had been named by the king in the charter as Governor, was elected to that office by the company. But in the latter part of the year 1629, several persons in England "of figure and estate," pro-

posed to remove to Massachusetts Bay, if they could be permitted to take with them the charter and to exercise its corporate powers in the colony. [1]

An arrangement was, at length, made, whereby this proposition was to be carried into effect, and such of the company as remained in England, were to share in the profits of the trading stock of the corporation for a certain number of years, while the control of its concerns was committed to those who chose to emigrate thither.

Pursuant to this arrangement, a new election of officers took place, and John Winthrop was chosen Governor and John Humphrey Deputy Governor. "This," says Chalmers, (p. 142 and 151) "was the first instance on record of a corporate body that ever sold itself," and he contends, that the first meeting at which Cradock was chosen Governor, was the only one that was held in conformity to the charter or the principles of the English law.

Winthrop left England in April 1630 with about 1500 colonists, bringing the charter with him, and arrived in the Massachusetts Bay on the 12th (old style) of the following June.

The first Monthly Court, or Court of Assistants as it was called, was holden on board the Governor's ship, the Arbela, in Charlestown harbor, Aug. 23, 1630, (1 Holmes 255,) and the first General Court was held at Boston, Oct. 19th of the same year. The first meeting of the latter

[1] An undue regard seems to have been had to the *possession* of the *instrument* by which their corporate powers were created. It was deemed necessary to take this with them in emigrating to Massachusetts, in order to exercise the powers it conferred within the limits of the colony to be formed there. The same idea seems to have prevailed at a later period, not only in Massachusetts but in the neighboring colonies. The secreting of the charter of Connecticut when about to be seized by Andros, will occur as an instance in point, to the recollection of those who remember the history of the "Charter Oak" of Hartford.

body for the election of officers was held on the last Wednesday of May 1630, which continued to be the day of the annual meeting of the General Court, until the commencement of the political year was changed by an amendment of the Constitution of the Commonwealth in 1831, at which time were completed two centuries of the history of this government.

The government of the company, as established by charter, was a pure democracy. But at the very first meeting of the General Court, the freemen gave up so much of their participation in the administration of public affairs that after choosing Assistants, they delegated to these the election of the Governor and Deputy Governor from their own number, and authorized the Governor, his Deputy and the Assistants to make the laws and appoint the officers of the colony. (Chalm. 153.) In May following, however, a law was passed requiring a General Court to be holden at least once in each year, at which "the commons may have liberty to propound the persons whom they should prefer for Assistants, and to exercise a similar right in their removal for misconduct or incompetency." At the charter election which took place soon after, the freemen resumed their original powers, and chose the Governor, Deputy Governor and Assistants. (1 Holmes 258.) At the same time, to guard against the influence of improper men in the colony, a law was made prohibiting any but freemen from voting at elections, or being eligible to office, or to act as Jurors, and limiting the right to be freemen to members of churches, whereby heretics and irreligious persons were excluded from all participation in the affairs of the government. This intimate connexion between church and state continued till near the close of the existence of the charter, and led to that direct interference of the clergy in the legislation of the colony, to which

General Court of Delegates was held May 14, 1634, when eight towns were represented, each by three deputies.[1] These were Newtown, afterwards Cambridge, Watertown, Charlestown, Boston, Roxbury, Dorchester, Saugus, afterwards Lynn, and Salem. (1 Wint. Sav. note 129.)

This was the second representative legislative assembly which convened in America, and, if we mistake not, the second that had ever convened, in which a direct and equal representation of the people was admitted. Virginia had adopted a somewhat similar system in 1620.

The authority which was thus construed to be delegated to the representatives of the people, was perpetuated by their own acts of legislation, and thence-forward the government was made up of the Governor, Assistants and Deputies. (1 Hutch. 39.) These all sat together as one body till 1644, although, as events will show, jealousies were soon excited in regard to the power of negative, which one branch possessed over the other. The Governor, if present, presided at their meetings, but had no negative upon their proceedings. He sometimes refused to put questions when they were opposed to his own views, but the Deputy Governor or some Assistant in such case, was competent to put the motion, and the vote thereon was equally valid as if put by the presiding officer. (1 Wint. 320. 1 Doug. 432. 1 Hutch. 61.)

The first disagreement between the branches of the government arose in relation to the removal of the Rev.

[1] The Deputies were to be chosen "by papers," and in making such selection the freemen were not confined to the inhabitants of their own towns: residence within a town which a Deputy was to represent, was not a requisite qualification for the office. (Col. Laws, ed. 1660. 24.)

But no man, though a freeman, could be accepted as a Deputy who was "unsound in judgment concerning the main points of Christian religion, as they have been held forth and acknowledged by the generality of the Protestant and Orthodox writers." (Ib.)

Mr. Hooker to Hartford in 1635. The subject came before the General Court, and the Assistants were of one opinion, while the Deputies were of another. The Governor and Deputy Governor were also divided in sentiment. The dispute ran high, and much ill blood was excited, when the usual remedy of the day for moral and political evils, was resorted to. A day of Fasting and Humiliation was appointed. Mr. Cotton was directed by the General Court to preach on the occasion, and the result of the controversy was that the Deputies agreed to the principle that a major part of each branch should concur in order to the passage of any act. (1 Hutch. 47.) [1]

A more singular departure from the letter and spirit of the charter, than any that has thus far been mentioned, was made in 1636. The colonists were desirous of inducing some of the leading men in England to emigrate to America, and for that purpose, a law was passed in that year, providing for the election of a certain number of the Assistants to hold their office during life, and three, viz. Winthrop, Vane, and Dudley, were actually chosen under this law. As might have been expected, however, a jealousy of an aristocracy was soon excited, and at the end of three years, annual elections of all their officers were again resumed. (1 Wint. 184. Felt. Sal. 97 and 121.)

Another important change took place in 1636 in regard to the mode of electing their officers. As has been remarked, after the establishment of a system of representation, it was still required that the body of the freemen should attend at Boston once a year, for the election of their officers. This meeting was held in "the meeting house at Boston." (1 Wint. 132.) But it was soon found

[1] The text of the preacher on this occasion may be found in Haggai ii. 4, but its applicability to the matter in controversy is not altogether obvious to common minds.

inconvenient for the freemen to attend, and another impediment arose in the way of their assembling, and that was the scarcity of food in Boston. It was therefore arranged that Salem, Ipswich, Newbury, Saugus, Weymouth and Hingham might retain as many of their freemen at home at the annual election as the safety of the towns required, and that these might send their votes by proxy. (Felt. Sal. 96.) A general law in regard to all the towns, authorising the freemen to send their votes by proxy, was passed in December of the same year, (An. Ch. 42.) which seems to have been the origin of the mode of electing Governor and other public officers which has ever since prevailed in the Commonwealth.

The Governor continued to be chosen by nomination and raising of hands, till 1634, when Dudley was "chosen by papers," as they are called in Winthrop's Journal, and in 1635, as appears from the same authority, (p. 159) the mode of election was as follows—"the Governor and Deputy were elected by papers, wherein their names were written, but the Assistants were chosen by papers without names, viz. the Governor propounded one to the people, then all went out and came in at one door, and every man delivered a paper into a hat, such as gave their vote for the party named, gave in a paper with some figures or scroll in it, others gave in a blank." [1]

In 1643 corn and beans were substituted for "papers"

[1] As the law required that the magistrates of the preceding year should first be nominated, the result was that in most cases the same board of Assistants was continued from year to year as long as they chose to serve. (Col. L. 107.)

In 1649 a method was devised, by law, to have the freemen of the colony nominate the candidates for Assistants. They were to come together in April and vote for fourteen whom they wished to have chosen as Assistants. Their votes were returned to Boston and the fourteen who had the highest number of votes were "nominated at the Court of Election," &c. (Col. L. Ed. 1660. 27.

in the election of the Assistants, the corn being the affirmative and the beans the negative. (Col. L. 105.) [1]

Johnson in his "Wonder-working Providence," (2 Hist. Col. iv. 22) thus describes the government of Massachusetts in 1637. "The Chief Court or supreme power of this little commonwealth, consists of a mixed company, part aristocracy and part democracy—of magistrates that are chosen annually by the major part of the whole body of the freemen throughout the country, and Deputies chosen by the several towns. They have hitherto had about twelve or thirteen magistrates in the colony. They have hitherto been volunteers, governing without pay from the people, only the Governor hath some years £100 allowed him and some years less."

An allusion has been made to the direct influence of the clergy in the affairs of the government, and it may here be remarked that it continued to be exercised by a formal appeal to them for advice, until 1682, when, for the last time, they were consulted in relation to the surrender of the charter. (1 Hutch. 303, n.) Among the instances of their participation in the civil power, it is related that at the election in 1637, Vane and Winthrop were rival candidates for the office of Governor. One party endeavored to delay, while the other pressed the election, and it was doubtful what would be the result, when Mr. Wilson, one of the ministers of Boston, got upon the bough of a tree and addressed the people in favor of proceeding with the election, and thereby so roused them that the

[1] In 1647 a law regulating the sending of votes by proxy was passed providing among other things that the Governor, Deputy Governor, Major General, Treasurer, Secretary and Commissioners of united colonies were to be chosen "by writing the names of the persons elected in papers open or once folded, not twisted nor rolled up that they may be the sooner perused." The Assistants were still chosen by Indian corn and beans. (Col. L. 106.)

measure was carried. (1 Hutch. 62, n.) This might seem to be a personal anecdote if it was not consistent with the usual course pursued by the clergy. They made the measures of government the subjects of their sermons, and when in 1639, it was thought advisable to prepare a body of laws for the regulation of the colony, a commission consisting of the Rev. Mr. Cotton of Boston and the Rev. Mr. Ward of Agawam or Ipswich were appointed for the purpose. Their labors resulted in producing one hundred laws, called "the body of liberties," all of which were fully sustained by marginal scripture references, and were adopted by the people in 1641. (2 Wint. 55.)

To show, however, how little the politics of the clergy comported with the democratic form of the government, it is stated that when the expediency of adopting the plan of having permanent Assistants was under discussion, Mr. Cotton maintained that God never ordained a democracy as a fit form of government for either church or state; that monarchy and aristocracy were both approved of in scriptures, but his opinion was that a theocracy was the best system for both church and commonwealth. (1 Wint. 135.)

The separation of the assistants and deputies into two houses which took place in 1644, grew out of a dispute in relation to a pig which was claimed by a poor woman against a man of considerable wealth and influence, which came before the court for decision. The deputies again insisted that a major vote of the whole assembly should determine the question, while the other party, especially Mr. Winthrop, strenuously opposed this controling power of a mere majority. At last it was agreed that the two houses should sit apart, and that each should have a negative upon the other, except in judicial matters, where a major vote of the two houses was still to decide questions that

should be brought before them. (1 Hutch. 135. Chalm. 166. Felt. Sal. 162. 2 Wint. 69. Col. Laws of 1660, 22.)

One consequence of this separation was that while the Governor, or the Deputy in his absence, continued to preside at the board of Assistants, a new presiding officer became necessary in the House of Deputies, and the title of *Speaker*, which was then adopted, has ever since been retained. The first incumbent who held this office, was William Hawthorn of Salem, a man of great influence in the colony. He was afterwards often called to the speaker's chair, but never in any two successive years.

From the rapid sketch that has been given of the constitution of the government under the first charter, it has already appeared that little regard was paid to separating the legislative from the executive branches of it, and there will be occasion to show that quite as little effort was made to keep them distinct from the judiciary as from each other. The executive power was chiefly in the hands of the Governor, Deputy Governor and Assistants. (Chal. 137.) The General Court assumed the right to inflict capital punishments, although no such authority was delegated in the charter. The power of pardoning was retained by that body, but the Governor and Assistants had a right to reprieve from the execution of a sentence of death until the next meeting of the General Court. The warrants for capital punishment were signed by the Colonial Secretary in the presence of the General Court and during its sessions.

Randolph states, in 1676, that the Executive Council or Assistants met twice every week, and as often besides, as the Governor convened them, and at these meetings he had a right to the casting vote; and these seem to have been the extent of his official powers.

The Governors, however, for some years, at least, sus-

tained a pomp and state that comported with a higher degree of authority than they, in fact, possessed. They were attended by four sergeants with their halberds, every Sunday, to church, and on all other public occasions. (1 Wint. 220.) But on the occasion of Winthrop being chosen over Vane in 1637, the sergeants laid down their halberds, and the Governor was obliged to call upon his own servants to bear them before him on his way to church.

If the design of this work admitted of pursuing the inquiry, it would be interesting to follow the various steps through which the legislature of the colony passed in order to rear upon so slender a basis as the charter of a trading corporation, a system of laws and institutions designed for a state practically independent, and possessing all the wants and capacities of an intelligent and enterprising commonwealth. Chalmers has preserved a great number of acts and instances which indicated an intention in the minds of the colonists to be in reality independent, many years before the seizure of their franchise in 1684. The limits of these sketches, however, do not admit of going into this inquiry, though it may be remarked as a sample of their disregard for the crown in matters of form, that the enacting clause of the acts of the General Court was simply "It is ordered by this Court and the authority thereof." (1 Doug. 431.) [1]

[1] Sundry regulations were made by the English commissioners who visited New England in 1665, in regard to "the Book of the General Laws and Liberties concerning the inhabitants of Massachusetts," among which were 1. That the title page should declare the king to be the fountain from which the colony derived their laws and liberties. 2. That all legal processes should be in his majesty's name. 3. That his majesty's arms should be set up in every court of justice, and 4. That the expression "commonwealth" used in these laws should be expunged and the word "colony" substituted. (2 Hist. Col. viii. 84.)

No particular change, having a bearing upon the judicial history of the colony, took place until the dissolution of the charter. It is therefore proposed to examine more in detail the course of administering justice during this period, and the propriety of these inquiries into the general and political history of the colony will be seen when it is understood that the Judiciary was identical with the other branches of the government, and that whatever illustrates the mode of proceeding in the one, exhibits what might be called the course of *practice* in the other. And if any of the details which are here collected shall at first seem trifling, and unimportant, it should be recollected that they often serve to illustrate the genius of a people, and their institutions, better than the more serious measures of government which usually form the subjects of history.

CHAPTER II.

The Judicial Department of the Colonial Government from 1630 *to* 1686, *with its officers and forms of proceedings.*

The power of establishing courts of justice was assumed by the colonists without any grant of authority in their charter. (1 Pitkin 42. White's Prob. 9.) But the necessity of such tribunals must have been so obvious, after the separation of the company and its government from England, that it seems to have been acquiesced in, even by the crown, without any serious objection to the jurisdiction which they assumed, so long as it was confined to their own citizens and to their own affairs. It was not until several years after the establishment of the colony that a regular system of courts of justice was settled, and even then the powers and jurisdiction of some of them were left vague and indefinite.

The principal of these were the General Court, the Court of Assistants, County Courts, Strangers' Courts, Inferior or Magistrates' Courts, Military Courts and the Courts of Chancery.

The highest in dignity and power, of these tribunals, was the GENERAL COURT, in which judicial matters were heard and decided, like other questions that came before it, by the votes of majorities. Until the year 1639 this court seems to have exercised the whole power, both legislative and judicial, of the colony, and to have held

jurisdiction both in civil and criminal matters.[1] But in 1639 a new organization of the judicial power was made, whereby several of the courts above mentioned, were created and the principal judicial powers of the General Court were transferred to the Assistants.

By the law of 1634, the General Court was declared "the chief civil power of this Commonwealth," and might act according to such powers "in matters of counsel, making of laws and matters of judicature." (Col. L. 88.)

Upon the establishment of courts of inferior jurisdiction, the General Court retained appellate power in some cases, and for some time after that, a party was admitted to prosecute his claims originally before this court in the form of a petition. To prevent this, a law was passed in 1641 inflicting a penalty upon any party who should bring any cause before this court, either by petition or review, (the latter being the mode of bringing up causes from the Court of Assistants,) where it should appear that he had no cause for such proceeding. (Col. L. 45.)

The next year a law was passed limiting the original jurisdiction of this court still further, by requiring that no cause should be commenced there nor tried by the court until the party bringing up the case had had one trial and a review in an inferior court, and was dissatisfied with the judgment. (Ib. 199.) Where the Jury and the Assistants differed in opinion in the trial of a cause, before the latter, the action was carried to the General Court to be determined as the last resort.

In all cases appealed to this or the Court of Assistants,

[1] It was early required that before the court should "proceed to judgment in any cause, civil or criminal," the Deputies should take an oath that "in all cases where I am to deliver my vote or sentence against any criminal offence or between parties in any civil case, I will deal uprightly and justly according to my judgment and conscience," &c. (Col. Laws, ed. 1660, p. 22.)

the trial was had according to the former evidence, and none other was admitted before them. (Ib. 47.) And in 1654 it was provided that if a court having cognizance of a case, had difficulty in determining the same, it might present the cause without the parties' names, to the General Court for their adjudication, and the judgment of this court was entered in the inferior court as the final judgment in the action. (Ib.)

In criminal matters the General Court had jurisdiction by appeal, when there was a division of three out of five or four out of seven, and in that proportion, among the magistrates who originally tried the case. (1 Hutch. 397, 8, 9. Dane c. 187, art. 9. Col. Laws, ed. 1660, p. 2.)

This court moreover sustained a kind of original chancery and supervising power which was continued until 1685, when a system of chancery, subordinate to that of the General Court, was established.

Lechford in his "*Plain Dealing*," written about 1640, says that "in the General Court are tried all actions and causes, civil and criminal, and also ecclesiastical, especially touching non-members, and they say that in the General and Quarterly Courts, they have the power of Parliament, King's Bench, Common Pleas, Chancery, High Commission and Star Chamber, and all other courts of England." "They have put to death, banished, fined men, cut off men's ears, whipt, imprisoned men, and all these for ecclesiastical and civil offences, and without sufficient record." He states that appeals lay to the General Court, and makes no qualification of the extent of this right, but probably after 1654, appeals to the General Court, except where the Assistants and Jurors disagreed, were comparatively limited and unfrequent.

This power of revising the decisions of subordinate

courts was exercised by the General Court as long as the charter was in force.

There will be occasion to refer again to the appellate power of this court, as well as to its forms of process and course of practice. But it may be observed, that the very general nature of its powers renders it impossible to define them with the degree of accuracy that might otherwise be desirable.

The next court in point of dignity, importance and power, was that of the ASSISTANTS, who derived their judicial authority from legislative enactment.[1]

By the law of 1639, there were to be two terms of this Court held "by the Governor and Deputy Governor and the rest of the Magistrates," in Boston, "to hear and determine all, and only actions of appeal from the inferior Courts, all causes of Divorce, all capital and criminal causes extending to life, member or banishment." (Col. L. 90.) And the Governor was authorised to call special meetings of this Court for the trial of capital offences. This is called by Lechford the "Great Quarter Court," and when he wrote, (1641) as he states, it held four meetings in a year, one of them being at Salem, one at Ipswich, and the other two in the meeting house in Boston.[2]

The right of appeal from the inferior Courts to that of the Assistants, was, by its terms, unlimited, but the same rule as in the General Court was in force, that the Court upon such appeals "judged the case according to the former

[1] Upon a question propounded to the Elders by the General Court in 1644, it was determined that the Assistants had no power "to act in judicature" without some law of the General Court granting the authority. (Col L. 733.)

[2] The Law constituting the Assistants a Court of Justice provided but for two terms of it, and those to be held in Boston, and Hubbard's account of the Court corresponds with this. I am therefore led to believe Lechford has led his readers into an error, by the loose manner in which he describes the colony courts, although himself a lawyer.

evidence and none other."[1] The jurisdiction therefore of this Court in judicial matters, was as extensive as that of the General Court, and it seems originally to have been intended to supercede, in a great measure, the necessity of the General Court's acting upon any thing but the public business.[2] Lechford therefore, when speaking of the jurisdiction of the General and Quarter Courts, regards it as the same, and says that they claimed to exercise the power of the King's Bench, Common Pleas and all other Courts of England. This Court also exercised Admiralty jurisdiction, and in 1673 was authorised to act without a jury, which seems to have been an innovation upon the former course of proceedings, as well as contrary to the genius of the Courts of the colony, in which, according to Lechford "matters of debt, trespass and upon the case, and equity, yea, and of heresy also, were tried by a jury." It had also appellate jurisdiction in matters of Probate which had been determined in the County Courts.

Another class of Courts established in 1639 were COUNTY COURTS, which embraced the powers of the Courts of Common Pleas and Sessions, as they were subsequently established. (17 M. R. 339.)

These courts were held by one or more of the Assist-

[1] There was an exception to this rule in case there was a difference between the Judges and jury about their verdict, so that either of them could not "proceed with peace of conscience." In such cases the action was "continued to the Court of Assistants." And the trial was had not only upon the evidence adduced in the County Court, but either party might introduce new evidence. (Col. L. ed. 1660, p. 48.)

[2] The act constituting the Assistants a Court for the trial of causes is in the following words. It is ordered, &c., "that there be Courts of Assistants yearly kept at Boston by the Governor, Deputy Governor and the rest of the Magistrates on the first Tuesday of the first month and on the first Tuesday of the seventh month to hear and determine all and only actions of appeal from Inferior Courts. All causes of divorce, all capital and criminal causes extending to life, member or banishment." (Col. Laws, ed. 1660, p. 23.)

ants or "Magistrates," as they were more commonly called, who resided in the county where the court was to sit, or by Magistrates appointed from time to time for that purpose by the General Court, aided by Commissioners who were nominated by the Freemen of the county and appointed by the General Court. The Commissioners and Magistrates together were to be five in number, but three of them, one being a Magistrate, were competent to hold a court.[1]

The jurisdiction of the County Courts extended to all causes, civil and criminal, except cases of divorce and crimes, the punishment whereof extended to life, limb or banishment. They were authorised, for this purpose, to summon grand and petit Jurors within their respective counties, and to appoint their own clerks and other necessary officers.

Their criminal jurisdiction was analogous to that of the Quarter Sessions in England. (17 M. R. 339.) And Randolph says that they also summoned Juries of inquest.

[1] The act creating County Courts is as follows: "Also there shall be County Courts held in the several Counties, by Magistrates living in the respective Counties, or any other Magistrate that can attend the same, or by such Magistrates as the General Court shall appoint from time to time, together with such persons of worth where there shall be need, as shall from time to time be appointed by the General Court (at the nomination of the Freemen of the County) to be joined in commission with the Magistrates, so that they may be five in all, three whereof may keep a court, provided there be one Magistrate. Every of which Courts shall have full power to hear and determine all causes, civil and criminal not extending to life, member or banishment, &c." (Col. L. ed. 1660, p. 23.)

No mode of making "the nomination of the Freemen" is pointed out in the statute.

The "associates" of the magistrates who were "chosen" to constitute the County Courts were required to take an oath of office "that they would do equal right and justice in all cases that should come before them after their best skill and knowledge according to the laws here established." (Col. L. ed. 1660, p. 86.)

As a Court of Sessions, they laid out highways, and licensed houses of entertainment, and among other duties, were charged to see that there was an able ministry, and that it was well supported. (Felt's Sal. 206.) They were authorised by a law of 1641 to admit persons as freemen of the colony.

They had also probate jurisdiction, and as such, proved wills, granted administration and the like. Appeals in such cases lying from their decisions to the Court of Assistants. (White's Prob. 9.)

This exercise of probate jurisdiction continued as long as the old charter was in force. The clerks of the courts were, ex officio, recorders, and in the intervals of the court, the recorder and two of the magistrates were authorised to grant letters of administration and probate of wills. (Ib.)[1]

These courts, as Randolph says, always met upon established days, and always begun their sessions upon Tuesday.

Appeals lay from the judgments of the County Courts to the Courts of Assistants, and they in turn had appellate jurisdiction over causes which were tried before single magistrates or commissioners of small causes. (Col. L. 46 and 67.) By a law of 1649, the original jurisdiction of the County Courts over causes not exceeding forty shillings, was taken away, and by a law of the following year, if a plaintiff failed to recover over that amount in an action of trespass commenced in a County Court, he failed in his action and was obliged to pay the adverse

[1] In addition to their other powers, these courts were authorised to "question and censure every person that should publish and maintain any heterodox or erroneous doctrine, according to the merit of his offence." (Col. Laws, ed. 1672, p. 61.)

party's costs, even though the damages claimed were sufficient to give the court jurisdiction. (Col. L. 45.)

Special orders were passed by the General Court from time to time, relative to these courts, which varied their powers and form of organization in some respects, but the description which is here given, presents a view of them, substantially as they existed while the old charter was in being.

STRANGERS', or as they were sometimes called, MERCHANTS' COURTS, were also established in 1639. These were designed to accommodate strangers who might visit the colony for trade or other purposes, and were unable to remain in the colony to await the ordinary course of justice.

They might be called, upon the request of such stranger, at any time, by the Governor or Deputy Governor and two Magistrates, or in the absence of the Governor and Deputy, by three Magistrates. The jurisdiction of the court was the same as that of the County Courts, and the mode of proceeding was the same. Their records, when made up, were transmitted to the Court of Assistants, to be entered there as the records of other trials. (Col. L. 91.) But no right of appeal seems to have been reserved, and as the object of establishing the court was to promote speedy justice, it is presumed no appeal was to be had from their decisions.

In 1650, strangers were permitted to enter actions in any court in the colony, notwithstanding the restrictions that then existed as to the venue of actions between resident citizens of the colony. (Ib.)

In 1682, strangers were restricted from suing other strangers in any of the colony courts, without first giving security for the payment of costs. (Ib. 192.)

With these and perhaps some other limitations, "Mer-

chant Courts were continued until the dissolution of the old charter, but were never revived after the change that then took place. (1 Doug. 434.)

COURTS OF CHANCERY were established in 1685, just before the dissolution of the Charter Government. Until that time, the General Court had exercised original chancery jurisdiction, but their business had become so great, that it was necessary to create another court to relieve them of a part of their duty. They accordingly constituted the Magistrates of the County Courts, chosen by the Freemen, a Court of Chancery, to grant summons and hear and determine causes upon a Bill of information exhibited to them "containing matters of apparent equity." They were authorised to examine the parties to the suit, as well as witnesses, upon interrogatories, under oath, and might decree "secundum aequum et bonum," and grant execution thereon.

Appeals lay from their decision to the Assistants, where the Magistrates who had heard and determined the cause, might state the reasons of their judgment, but were not permitted to vote upon the question of affirming their decision. The judgment of the Assistants was conclusive, unles the General Court, upon application, saw fit to order a re-hearing before the Magistrates of the County Court, with liberty again to appeal as at first, or, "in arduous and difficult cases," chose to admit a hearing of the parties at their own bar. (Col. L. 93.)

It will be perceived that the erection of a chancery jurisdiction was little more than enlarging the powers of the County Courts, but it has been presented in this distinct form, because the exercise of this power was, in fact, distinct from that of the other powers of the court, and serves to exhibit the notions of the people under the first charter in relation to this, so often contested, branch of the judi-

cial system of Massachusetts. It was the last judicial tribunal created by the legislature under the first charter, and, as will appear, not only was there a court with chancery powers established under the administration of Andros, but a court with similar powers was one of the first to be created by the General Court under the new charter. And it was by the arbitrary power of the crown alone that it was at last suppressed.

A MILITARY COURT, or Commission was established in 1634 to manage the military affairs of the colony. The Commissioners were the Governor, Deputy Governor and nine other persons named in the commission, and new members were added from time to time while the court continued to exist. Its powers were exceedingly broad. A majority of those named in the commission might make offensive and defensive wars, confine or imprison any whom they might judge enemies to the Commonwealth, and put to death such as would not come under command or restraint as they should be required.

The Commission, at first, was to extend only till the meeting of the next General Court, but it was extended from Court to Court several times, though it is not easy to ascertain how long it remained in force. (1 Wint. 156 n.)

In enumerating the tribunals of justice established from time to time, in the colony, it is proper to mention the Commissioners of Oyer and Terminer, who were appointed by the government in England in 1664 to visit the colonies and hear and determine all matters of complaint, and to settle the peace of the County.

The commission consisted of Col. Richard Nichols, Sir Robert Carr, George Cartwright, and Samuel Maverick, any two or three of whom might form a quorum for the

transaction of business.[1] They arrived in Boston in July 1664, but their authority was resolutely resisted, and after a violent controversy, the attempt to establish their jurisdiction as a Court of justice was defeated, and they were never recognized as such in Massachusetts, although they partially succeeded in the exercise of their powers in some of the neighboring colonies. (1 Hutch. 211, 255.)

Besides the Courts already mentioned, there was a class of Inferior Courts for the trial of small causes, and offences of inconsiderable importance, whose powers were not only various but were changed from time to time as the condition and wants of the people required.

It is stated by Mr. Dane, (6 Abr. 399,) that it does not satisfactorily appear when these Inferior Courts were first established. Mr. Stearns (R. Actions 506) states that jurisdiction in civil actions under forty shillings was conferred upon Magistrates by a law of 1644, and that this was the origin of the civil jurisdiction of Justices of the Peace in Massachusetts. Judge Parsons (in 4 M. R. 515) says that Justices of the Peace were not known as officers under the first charter, and this may be correct so far as the mere name is concerned by which they were known in law. But Randolph says that every Magistrate was a Justice of the Peace, that they could try causes under forty shillings, commit to prison and punish offenders for breaches of the laws, and impose fines at discretion.

By refering to the Court and colony records, it will appear that the existence of the judicial power of single Mag-

[1] Nichols was the first English Governor of New York and left that Government in 1667. Carr was concerned with Nichols in the conquest of New York from the Dutch. He returned to England and died there in 1667. Cartwright returned to England in 1665 and on his voyage was captured by the Dutch. Maverick was the son of Mr. Maverick, who was residing on Noddle's Island when Governor Winthrop landed at Boston. (Allen,—Elliot.)

istrates, and of "Commissioners of small causes" is often recognized, though I have not been able to trace the original grant of this power.

The first of these in importance were the MAGISTRATES. This was the title applied for many years, to the Assistants, who by the charter were to be eighteen in number. By an early law however, the number was limited to fourteen and was not restored to the original number till 1661.

By the provisions of the colony laws which stand over the dates of 1647 and 49, Magistrates within the towns in which they resided, might hear and determine without a Jury, all causes arising within their respective Counties, where the debt, trespass, or damage did not exceed forty shillings, and might issue writs and other process for the purpose.

They were moreover empowered to hear and try "small thefts" and other small offences, when the damage or fine did not exceed forty shillings, and where the offender was unable to satisfy such fine, the magistrate might punish by stocks, or whipping not exceeding ten stripes.

Among other powers conferred by law upon the magistrates was that of solemnizing marriages, and for many years none but civil officers were authorized to join persons in marriage.

"COMMISSIONERS OF SMALL CAUSES" were empowered to act in all causes within the jurisdiction of a magistrate, and were approved by the Court of Assistants or County Courts, upon the request of any town where there was no resident Magistrate. They were three in number in each of such towns, and were chosen by the people—two of them forming a quorum for the transaction of business. Their jurisdiction was confined to their own particular towns, except that where the parties lived in different

towns, the plaintiff had a right of election in which to commence his action.

These commissioners had the power of trying civil causes, but they could not enforce any judgment by imprisoning a party, and they could only remit the cause to a Magistrate or County Court to have execution granted, where the party refused to give satisfaction and had no goods in the town where he dwelt which could be reached for this purpose.

The criminal jurisdiction of these commissioners was confined to issuing warrants to make searches and apprehend offenders, when no Court nor Magistrate was at hand to issue such order.

They were moreover empowered by an act of 1663, to take the testimony of witnesses in civil and criminal matters, and to exercise the authority previously given to the associates of the County Court, to administer oaths and take the acknowledgments of deeds "and of surrender of the right of dowry at any time out of court." (Col. Rec.) The authority here referred to as given to the Magistrates was under the act of 1641 relative to dower, (Col. L. 99) which, it is supposed, may have been the origin of the mode of releasing rights of dower in use in Massachusetts, by married women joining with their husbands in deeds of their estates.

In addition to Magistrates and Commissioners of small causes, there were cases where the SELECTMEN of towns were made competent to try civil causes which were within the jurisdiction of a Magistrate. These cases were where only one Magistrate dwelt in a town, and he was interested in the cause to be tried, and where there was no Magistrate and the cause concerned one or more of the Commissioners. In such cases the Selectmen were au-

thorized to hear and determine causes and to issue executions to enforce their judgment. (Col. L. 67.)

Selectmen of towns were moreover authorized to try offences against the by-laws of such towns, where the penalty did not exceed twenty shillings, but the by-laws could not extend to any thing criminal. (1 Hutch. 397—99.)

In 1651 a Court peculiar to Boston was created, which partook partly of the nature of that of Commissioners and partly of the County Courts. The reason given for its establishment was the concourse of people and increase of trade in the town, and that many crimes were committed there by strangers and others who often escaped unpunished. This Court was to consist of seven Commissioners to be chosen by the freemen of the town, and approved of by the Assistants, any five of whom, or three if a Magistrate was present, could hear and determine all civil actions not exceeding ten pounds, arising within certain limits, including some of the islands in the harbor, and extending to the neck of land that separates Boston from Roxbury. They had also jurisdiction in criminal matters where the penalty did not exceed twenty shillings. They received their commissions from the Secretary, and had the power of appointing their own clerk. Appeals lay from their decisions directly to the Assistants, and so far as their jurisdiction extended, that of the County Court was superceded. (Col. L. 67, 68.)

This Court was created only for a single year, and as appears from Hutchinson (i. 162) a jealousy arose against the apparent independence which Boston was acquiring, and the law creating it was not renewed.

It was however customary, as appears from the colony records, to make appointments of special Commissioners with more or less extended powers, as the occasions of

particular parts of the country required. Thus in 1658, there being no Magistrate in Salem or Charlestown, Mr. Hawthorne was appointed for the former, and Richard Russel for the latter, to act in criminal matters, marriages, giving oaths in civil cases, &c. "as any one Magistrate might do by law." (Col. Rec.) In 1661 two of the Commissioners in Lynn were authorized to marry, administer oaths, &c. in the same manner as one Magistrate might do.

There was also in every town a "Clerk of the writs" chosen by the town and approved of by the County Courts who was authorized "to grant summons and attachments in civil actions," and "summons for witnesses," "to grant replevins and to take bonds with sufficient security to the party to prosecute the suit." (Col. L. ed. 1660, p. 18.)

Appeals lay from the judgments of single Magistrates, Commissioners of Small Causes and Selectmen, to the County Courts, and the party making it was obliged to file the reasons of his appeal in writing "without reflecting on Court or parties by provoking language." (Col. L. 47.)

To guard against prejudice in the minds of the judges no man who had set as judge of the Inferior Court could vote in the trial of any cause in the Superior Court which had once come before him. (Ib.)

Although this description of the Courts of Justice under the old charter has been necessarily brief and perhaps imperfect, and although the names, by which our Judicial Courts have since been known, differ from those of the Colony, the Constitution, powers and forms of proceedings of the latter often serve to throw light upon our present system, and may help to explain the forms of practice which prevail at this day.

Under the new charter, the General and Assistants Court

were embodied in the Superior Court, the County Courts assumed the form of Courts of Common Pleas and Quarter Sessions, while Regular Probate Courts exercised a part of the former powers of the County Courts, and the jurisdiction of Magistrates and Commissioners of small causes came to be exercised by Justices of the Peace in the same manner, it will be shown, as was done when the colony charter was vacated in 1686.

During the period thus far spoken of, although the Courts of Justice were in theory of as popular a character as could well be imagined, great care was taken that their administration should be pure, and that the judges should be as free from any undue bias as the nature of things would admit. It has already been stated that no judge was permitted to sit in a Superior Court in the trial of a case upon which he had passed in an inferior one. In addition to this, it was provided by law in 1649 that no one should ask counsel of a Magistrate or Commissioner in any case where he should afterwards be plaintiff or defendant, and the following year, a law was passed rendering a judge incompetent to vote in cases when either of the parties stood to him in the relation of father, or son, or brother, or uncle, or nephew, or landlord, or tenant, although he might "give reasonable advice in the case." (Col. L. 91.)

CHAPTER III.

Forms of Judicial Proceedings.

The Assistants, though nominally annual officers, were in fact, from the course adopted in their election, all but permanent in their places; and, as a principal part of their business must have been to administer justice, they may be regarded, as a tribunal in a good measure independent. Besides, from their familiar acquaintance with their own modes of business, one might naturally expect that something like an uniform system would have been adopted by them in their forms of practice and the principles of their decisions. And such, to a certain extent, was the case. But the public mind was too much engrossed by personal wants and dangers, or by the religious controversies in which all were embroiled, to admit of their attending to any thing like jurisprudence in an enlarged sense. And in the total absence of learned professional lawyers as well as of judges whose minds had been disciplined by the study of the law, as a science, we shall look in vain for much improvement or advance in the character of the Judiciary during the existence of the colony charter.

It is proposed to present, so far as has been found practicable, an outline of the course of practice in the Colony Courts. But in so doing, it will be necessary to offer details that to some may seem unnecessarily prolix and unreasonably minute and uninteresting.

The Executive officer of the Courts, was at first called the "Beadle of the Society," but was afterwards, called

the "Marshal," which appellation was retained during the existence of the first charter. There were also, from an early period, Constables elected in the several towns, who were authorized to serve writs of attachment, and to perform a great variety of duties connected with the domestic police of the colony. By the law of 1675 Marshals and Constables were to make their returns "upon the backside of the attachment," and to deliver the same to the plaintiff in the action, instead of returning them to Court as they had hitherto done. And this usage as to the endorsement of returns has been continued down to the present day.

Writs were not required to be in the king's name until 1662, when a law to that effect was passed by the General Court.

Previous to 1639, judicial proceedings were very irregularly preserved. But in that year a law was passed requiring Courts, Magistrates, and Commissioners to record their judgments, with all the evidence in each case, in Books, "to be kept to posterity," and whoever has had occasion to examine the records of these Courts, for many years after this period, has seen with what fidelity this order was obeyed.[1] The testimony of the witnesses was given in open court, and written down by the clerk in form of depositions, and formed a part of the record of the case. Many of these, extending through a great number of pages, are preserved in the early volumes of the Court Records.

Juries were early employed in the trial of causes, but the precise period when they were first used does not appear. They were in use as early as 1633, but Hutchin-

[1] The improvement in their judicial proceedings by having them recorded may, I believe, be ascribed to Lechford, for we find this measure among his "propositions made to the General Court upon request, 8th June, 1639."

son says he had found only one case, except capital ones, previous to that time, in which the trial was by Jury.

In 1634, a law was passed requiring all trials for life or death to be by Juries chosen by the freemen.

It is stated by Hutchinson, upon the authority of Winthrop and Hubbard, that Grand Juries were first established by law, in 1635, but in the case of Capt. Stone who was charged with a variety of offences, it is stated by Winthrop, under date of 1633, that "at the Court his indictment was framed for Adultery, but found 'ignoramus' by the *Great Jury.*"

After 1635, criminal prosecutions were by inquest of a Grand, and trial by a Petit Jury.

Both Grand and Petit Juries were summoned in the same manner.

In 1633, the process by which traverse Juries were summoned was by a warrant from the Secretary to the Beadle, directing him to warn twenty four Jurors, to be named by the Secretary, and they were to be summoned fourteen days before the Court, at which they were to serve.

By a law of the following year, the mode of summoning Juries was changed. The Secretary or the Clerks of the Courts, sent their warrants to the Constables of the several towns for a certain number of Jurors, and the Constables, thereupon, convened the freemen of their respective towns, who chose the requisite number. There were two Grand Juries summoned for the Court of Assistants in each year, one in March, and the other in September, whose duty it was, "to inform the Court in respect to offences which should come to their knowledge." (Felt's Sal. 95. Hub. 159.) Lechford says there were also two Grand Juries summoned each year to attend upon the General Court.

The Jury of trials were made judges of law and fact,

although an attempt was made in 1642, to have Juries find matters of fact with damages and costs, and leave the Court to declare sentence upon it. But the law was a temporary one, and Juries very seldom found special verdicts. They were however at liberty to find, as much as they could, "if they could not find the *main* issue in matter of fact," and when they were not clear in their "judgments and consciences" concerning any case, they were at liberty "in open Court, to advise with any man they should think fit, to resolve or direct them, before they gave their verdict."[1] (Col. L. ed. 1660, p. 47 and 48.)

Verdicts were sometimes rendered that there were strong grounds of suspicion, but not sufficient evidence to convict, and upon such verdicts, the Court gave sentence for what appeared to them on the trial, the defendant had been guilty of, although neither charged in the indictment nor found by the Jury. (1 Hutch. 401.) This may have led to the adoption of that part of the oath now administered to Jurors in criminal cases, that if they find the defendant not guilty "they are to say so and no more."

It frequently happened that Courts and Juries differed in opinion, and it was very common for the Court in such cases to refuse to accept the verdict. The consequence of this was, the cause was carried to the next Court of Assistants, or to the General Court, as the case might be.

A memorable instance of such a controversy between the Bench and the Jury, arose upon the trial of Anne Hibbins for witchcraft in 1656. The Jury found her guilty, but the Magistrates refused to accept the verdict, and the case was carried to the General Court where the

[1] In 1665, probably to correct a different practice that had grown up in the Courts, parties were required "to present the whole plea and evidence before the case was committed to the Jury, and no after plea or evidence was to be admitted to any person."

popular clamor prevailed, and she was convicted and executed. (1 Hutch. 173.)

In order to put an end to the inconveniences arising from such disagreements between Courts and Juries, a law was made in 1672, that after the Court had explained the law to the Jury, and "compared the matter of fact proved therewith," the verdict should be accepted and judgment rendered thereon. The remedy for "the party cast," however, was by *attainting* the Jury, in open Court, for error or corruption, and upon his giving bond to prosecute the Jury, at the next Court of Assistants, in an action of attaint, execution was to be staid. The Clerk thereupon summoned twenty four men as a Jury to try the matter of attaint, and if upon this trial, manifest error or mistake were found in the original verdict, the party was restored to his rights, and if the Jury found corruption in the former Jury, they were fined or imprisoned. (Col. L. 146.)[1]

This right of attainting Juries was found liable to such abuses, that in 1684, a law was passed requiring a party to specify the grounds of his attaint in writing, and if he failed in his action of attaint, he was fined ten pounds, and was obliged to pay forty shillings to each Juror, and was moreover subject to actions of slander by the Jurors who should be charged with corruption. (Ib. 147.)

It was usual for Juries to find by their verdict, which of the parties should be charged with costs, instead of the costs following the judgment as a matter of course, and this may probably be traced to an ordinance of 1641, that the plaintiff or defendant should pay costs according as

[1] The power now exercised by the Courts to set aside verdicts of Juries as being against the weight of evidence, cannot be traced to this power of attaint, for that could not be exercised by less than twice the number of the original Jury, whereas a bare majority of the judges of the Court are now competent to reverse the decisions of Juries, upon pure matters of fact.

he should be in fault, leaving the question of fault to be settled like other matters of fact. (Felt's Sal. 153.)

Although Juries were thus early employed, in trials, it is said by Winthrop (111,) that it was often left to the prisoner to be tried by the Bench or a Jury,[1] but the attachment to trials by Jury was justly prevalent and strong throughout the history of the colony.

In regard to matters of costs, there are a great many early colonial ordinances, the object of which seemed to be to deter litigation, and to relieve the people from the burden of supporting the government.

The fees paid for the entry of actions varied from ten *groats* to ten shillings, according to the magnitude of the demand sued, and pretty severe penalties were imposed, in some cases, upon the party who should prosecute a groundless action or appeal.

In order to compare the amount recovered by a prevailing party then, in the form of costs, with what he would now recover, the following has been transcribed from the records of 1654: "A bill of costs for the widow Blaisdell in her complaint against Edward Colcord to the General Court. For attendance at the first session, 10 days, £1. For attendance at the next session, 10 days, £1. We apprehend this bill to be 10 shillings overcharged, and do allow the widow the sum of £1 10s." "A bill of costs for Thomas Morton. For 10 days at the first session of this court, £1. Myself and wife attendance at Hampton court 6 days, 12s. Attendance at this court, £1 12s. An attorney to follow the case two sessions of the General Court 18 days, £1 16s. £5 total." These were causes which were determined in the General Court, and attend-

[1] A law of 1641 authorized parties by mutual consent, to have their causes tried by the Bench without a Jury in civil and criminal matters. (Col. Laws, ed. 1660, p. 77.)

ed with much delay, but most cases were heard and determined at the term of the court in which they were commenced, and justice was as prompt as it was summary.

Oaths were administered by holding up the hand, as it was regarded idolatrous to swear by the Bible, although such had been the form to which they had been accustomed in England. (1 Hutch. 401.)

The forms of judicial proceedings under the colony were exceedingly simple. Writs were very concise, and until 1662, were not even in the king's name. These writs were in form, both capias and attachment, and were required to be served at least five days before court. Justice moreover was summary, for, as stated by Lechford, "most matters are presently heard and ended the same court." A statute of *jeofails* was early passed,[1] and the courts rarely troubled themselves with pleas in abatement.[2] (1 Hutch. 400.) Little regard was paid to the forms of action, as there will be occasion hereafter to show. They had actions of Replevin, Debt and Trespass, and sometimes adopted a proper form of process to recover possession of real estate. But the most common form of action, as well to recover lands, as damages for direct and immediate injuries, was that of *Case*. Examples of which will be offered in the course of this part of these Sketches.

[1] Col. Law, ed. 1660, p. 4.

[2] Among the improvements proposed by Lechford in 1639, to be made in the proceedings of their courts, was "that every action be declared in writing, and the defendant's answer, general or special, as the case shall require, be put in writing by the public notary, before the court sits." My inference is that up to this time there had been no pleadings in writing, nor could there well be any formal pleadings for many years afterwards, since each party seems to have been left to frame his own declaration to suit his own notions of propriety.

The form of criminal proceedings, as has been before observed, was by indictment, presented to the Grand Jury, upon which they endorsed "ignoramus" or "a true bill." Sometimes however, they endorsed upon bills presented to them, that "they had strong ground for suspicion, but not sufficient to put the party upon trial." Instances are mentioned by Hutchinson, of members of the court rising in their places and charging the prisoner with crimes, after he had been tried and acquitted of the offences originally charged against him, and of his being tried upon the charges thus made against him. (i. 401.)

Bills of indictment were not very formal, as will be shown, nor was there any stated Attorney General under the colony laws, to prosecute offenders.

The reason for the informality of these proceedings perhaps may be found in the account given by Chalmers of the want of regard entertained by the colony for the laws of England. "The laws of England, they considered as not binding on them, because inapplicable to so godly a people, and the Jewish system of laws they almost literally adopted. When the customs of the Commonwealth were found defective, it was provided that the crime should be decided according to the word of God." (p. 144, 166 and 168.) Some allowance however should be made for the splenetic temper of this writer towards New England and especially Massachusetts.

In 1642 authority was given to the courts to admit parties to sue "in forma pauperis," and this was occasionally done, as appears by a reference to the records, though I believe this extended only to the remission of court fees. A case of this kind was Tyler vs. Chandler in 1667. It had been tried at the County Court and appealed to the Court of Assistants, where the Court and Jury disagreed, "and so it falls to the General Court." There "the Mag-

istrates judge it meete to order Job Tyler's case against Thomas Chandler be heard *sub forma pauperis*, their brethren the Deputies hereto assenting," which assent was given as appears by the record, and the judgment of the County Court was affirmed. (Col. Rec.)

It was many years after the settlement of the colony, before any thing like a distinct class of Attorneys at Law, were known. And it is doubtful if there were any regularly educated Attorneys who practised in the courts of the colony at any time during its existence. Lechford, it is true, was here a few years, but he was soon silenced, and left the country. Several of the Magistrates had also been educated as lawyers at home, among whom were Winthrop, Bellingham, Humfrey and probably Pelham and Bradstreet. But these were almost constantly in the Magistracy, nor do we hear of their ever being engaged in the management of causes. If they made use of their legal acquirements, it was in aid of the great object which they had so much at heart,—the establishment of a religious Commonwealth, in which the laws of Moses were much more regarded as precedents than the decisions of Westminster Hall, or the pages of the few elementary writers upon the common law which were then cited in the English courts.

It was therefore, that the clergy were admitted to such a direct participation in the affairs of the government, and that to two of their number was committed the duty of codifying the laws, by which the Commonwealth was to be thereafter governed.

There were attorneys it is true, and there were lawsuits and all the concomitant evils growing out of the bad passions involved in litigation, and there was a law against barratry, passed in 1641, because, even then, there was barratry practised in the courts. And the profession seems

to have won but little favor in the public mind, although for the first ten years of the government, there were no fees allowed to the "patrons," as they were called, who defended or aided parties in their suits. The first practising Attorney in the colony did little to conciliate the public mind in favor of the profession, and those who pleaded in the courts after his time, had little personal character to bring to the employment. I have been indebted, among other sources, to Mr. Willard's Address before the Worcester Bar in 1829, for the names and employments of several who acted as Attorneys under the old charter. Among these were JOHN COGGAN, who was a merchant, and AMOS RICHARDSON, who was a tailor, WATSON was once a merchant in London, and BULLIVANT was a physician and apothecary. CHECKLY was a merchant, and some others might be named, but these will serve to show how little claim the profession of law then had to being a liberal one. A law, in fact, was passed in 1663 excluding "usual and common Attorneys," from a seat in the General Court. The reason of this was partly the existing prejudice against this class of men, as they were then known, and partly because appeals lay from the inferior courts to the General Court, and it was apprehended that the lawyer might not lay aside his former prepossessions in favor of his client when acting in the capacity of a Judge. (3 Hutch.)

The want of suitable persons to present the claims of suitors before the courts led to a practice which had grown to be so general, that in 1641 the Rev. Mr. Ward made it the subject of severe animadversion in his election sermon of that year. The custom was for suitors to apply privately to the Magistrates who were to try their causes, and by an *exparte* statement, forestall the favorable opinion of their Judges. In consequence of the ser-

mon of Mr. Ward, an attempt was made to introduce a law restraining Magistrates from holding such intercourse with suitors, but it was resisted on the ground that it would render it necessary to employ lawyers to present the causes of parties before the court. (2 Wint. 36.)

This practice of *exparte* hearings was as has been before stated, at last prevented by a statute passed some years after public attention had thus been called to the evil.

With all the guards, however, which the jealousy of the colonists devised against the legal profession, they never seem to have accomplished the purpose which they had at heart, that of making litigation cheap, and, at the same time, the administration of justice summary. If the first was accomplished, it was found that the law would have delays; suitors, if they could not find Attorneys to present their causes, would present them as they could, themselves, and in so doing the time of the courts must be absorbed, and the patience of the Judges tried by the statements and arguments of the parties or their "patrons." And the very cheapness with which suits might be carried on, multiplied the business of the courts and extended the evils of litigation.

This state of things led to the enactment of a law in 1656, in the following terms. "This court, taking into consideration the great charge resting upon the colony, by reason of the many and tedious discourses and pleadings in courts, both of plaintiff and defendant, as also the readiness of many to prosecute suits in law for small matters. It is therefore ordered, by this court and the authority thereof, that when any plaintiff or defendant shall plead, by himself or his Attorney, for a longer time than *one hour*, the party that is sentenced or condemned shall pay twenty shillings for every hour so pleading more than the common fees appointed by the court for the entrance of

actions, to be added to the execution for the use of the country." (Col. Rec.)

In this connexion also reference may be made to an order passed in 1650 in relation to preserving order in courts, &c. If any person should disorderly speak privately during the sitting of the court, with his neighbor, or two of them together, he was subject to a penalty of twelve pence if the court thought proper to impose it.

It was further ordered that if any member of the court should reveal any secret which he had been enjoined to keep, or make known what any member of the court should speak concerning any person or business in court, he should forfeit ten pounds, and be otherwise dealt with at the discretion of the court (Col. Rec.)

As has already been observed, there does not appear to have been a class either of learned lawyers or men exclusively devoted to that profession at any time during the colony charter. Of those whose names are most often found in the judicial records of this interval, the history belongs rather to a subsequent period, although their business in the courts was merely subsidiary to the other business in which they were engaged. But there was one who has already been referred to, whose name is identified with the earliest judicial history of the colony, and who ought not to be passed over without being further noticed.

Thomas Lechford, was regularly educated to the bar in England, and came to Massachusetts in 1637, to seek his fortune in the practice of his profession. He remained here till 1641, when he returned to England and became a member of Clements Inn.

Whatever may have been his success in the colony, at first, he soon managed in such a manner as to be deprived of his means of livelihood. At a Quarter Court held in September 1639, the following order was passed: "Mr.

Thomas Lechford for going to the *Jewry* and pleading with them *out of Court*, is debarred from pleading any man's cause hereafter, unless his own, and admonished not to presume to meddle beyond what he shall be called by the Court."

As he probably found little profit in pleading "his own" causes, it would seem by another order of the court in December 1640, that he had ventured to violate its former order, for it is recorded that "Mr. Lechford acknowledging he had overshot himself and is sorry for it, promising to attend to his calling and not to meddle with controversies, was dismissed."

The "calling" to which the unfortunate lawyer had alone a right to attend, was that of a scrivener, which he found so little profitable that in the following year he returned to England where he published "Plain Dealing or News from New England," in 1642. This singular production in which the writer occasionally exhibits his feelings of disappointment in no measured terms, is among the most authentic sources from which a knowledge of the civil and ecclesiastical policy of the colony is to be derived, and has been recently republished by the Massachusetts Historical Society. I have already made frequent reference to this work, and regret that our knowledge of the life of the author is so extremely limited. I should have been happy to have traced his history after leaving the land of his adoption. But beyond his fame as an author, oblivion has settled down over his name, and the few years that he flourished as the whole profession—the embodied Bar of Massachusetts Bay—were probably the only period of his life which gave immortality to his memory. (3 Hist. Col. 3d Ser. 2 Wint. 36.)

There was one lawyer in the colony as early as 1625, who though he never attempted to pursue his profession

here, acquired no very enviable notoriety. It was THOMAS MORTON, who was master of the revels at Merry Mount in what is now Quincy. His graceless conduct and scandalous "rhymes and verses" gave such offence to the staid and sober fathers of the colony that they caused him to be taken and sent back to England in 1628, after having been "set in the bilbows." In a work which he published about the colony in 1637, he styled himself "of Clifford's Inn Gentleman." But the Memorialist of Plymouth calls him "a pettifogger at Fernival's Inn." It was Morton who first invented the story so ludicrously told by Hudibras, of the Colonists hanging a bed-rid old weaver to appease the Indians for a murder committed by a very useful cobbler. He returned into the colony in 1643, where he was arrested, thrown into prison and tried for his misconduct towards the colonists, and after having been detained in prison about a year, he was fined £100 and set at liberty. The reason given for setting him at liberty was that he was old and crazy, and they chose to give him a chance to go out of the jurisdiction for "he was a charge to the country."

He availed himself of the opportunity to depart, and went to "Acomenticus," (York) "and living there poor and despised he died within two years after."

Before proceeding to illustrate this period by a reference to the particular cases which have been selected for that purpose, it is proper to remark that the courts of the colony seem to have paid little regard to the ordinary rules of evidence, while some customs, supposed to be somewhat peculiar to New England, may be traced to the positive enactment of its early legislatures.

When, for instance, the custom of using books of account with the supplementary oaths of plaintiffs, in actions for the recovery of debts of that character began, it does not

appear. But in 1654 the court, "taking notice of the imperfect matters that are tendered many times for evidence before the judges with reference to shop books, and writings of like nature," passed an order requiring books to be kept in a particular form in order to be admissible as evidence. And "for any wares sold," the judges would not be willing to take the oath of the plaintiff in his own case, unless it be "to the truth of the whole book," except under certain limitations specified in the order.[1]

The cases which have been selected as illustrative of the course of criminal proceedings under the colony, will, at the same time, serve to throw light upon the prevailing notions of the people during this period. Many of the offences of which the courts held cognizance, could only have been violations of those strict rules of propriety and decorum which had their origin in the religious austerity by which the habits and feelings of the people were chastened and controled. Men often smile at the nature of these offences and the punishments which were inflicted upon the delinquents, because they judge of things by their own notions of propriety, and forget the mixture of civil and ecclesiastical police, by which the codes of law and morals in the colony were distinguished.

Many of the following cases have often been referred to by historians, but it seems none the less proper that they should be repeated in this connexion.

In 1631, the Court of Assistants ordered Philip Radcliff to be whipped, to have his ears cropped, and to be banished, for reproaches against the Government, and the

[1] The term of three years was the period of limitation of suits on Book debts by the law of 1669, but was extended to six years by the act of 1672. (Col. L. ed. 1672, p. 4.)

church at Salem, and the sentence was executed accordingly. (Felt's Salem, 54.)

The same year, for some offence, not mentioned, the court ordered Thomas Graves' house at Marble Harbor to be torn down, and that no Englishman should give him entertainment, (Ib. 56,) thus making him in fact an outlaw beyond relief.

Among other instances of punishment the precise date of which does not appear, were the following. Josias Plastow for stealing four baskets of corn from the Indians, was ordered to return them eight baskets, to pay a fine of five pounds, and to be called by the name of Josias and not "Mr." as he had before been called.

Edward Palmer for his extortion in taking two pounds thirteen shillings and four pence for the wood work of the Boston stocks, was fined five pounds, and was ordered to be set one hour in the stocks of his own handi-work.

Thomas Petit, "for suspicion of slander, idleness and stubborness, was ordered to be severely whipped and to be kept in hold."

John Wedgewood, for being in the company of drunkards, was sentenced to be set in the stocks.

In 1638, the wife of Thomas Oliver of Salem, was punished for slandering the elders of the church, by wearing a cleft stick upon her tongue for half an hour. (Felt's Salem, 118.)

In 1644, at the Quarter Court at Essex, William Hawes and John, his son, were presented for deriding such as sing in the congregation, terming them fools. Also William Hawes, for charging Mr. Cobbit with falsehood in his doctrine. Hawes and his son were ordered to pay fifty shillings each, and to make a humble confession at Lynn, at a public meeting. (Lewis's Hist. Lynn, 83.)

The following year, Samuel Bennet was presented at

the same court for saying in a scornful manner he neither cared for the town nor any order the town could make. (Ib. 87.)

In 1652, the Quarterly Court of Essex, presented Esther, the wife of Joseph Jynks, Jr. "for wearing silver lace," and Robert Burgess "for bad corn grinding," and others were presented for wearing great boots and silk hose. (Ib. 99.)

In 1630, the Court of Assistants sentenced Henry Stevens, to be a servant to Mr. Humfrey, for twenty one years, for burning his barn. (Ib. 73.)

And at a court in Salem in 1643 Roger Scott was presented "for common sleeping at the public exercise upon the Lord's day and for striking him that waked him." And in December following not having amended his conduct, he was sentenced "to be severely whipped." (Ib. 81.)

The delusion in regard to witchcraft was early felt in New England, and the first victim to the forms of justice for this offence, was Margaret Jones of Charlestown who was executed 1648. (2 Wint. 326.) Anne Hibbins suffered death for the same offence in 1656.

In 1686 among the last causes which came before the Court of Assistants under the colony, Col. Shrimpton was indicted "for that he at the County Court sitting in Boston on the 22d of March last, in a tumultuous violent and seditious manner, and with a loud voice and in open court did say that he was brought there by Mr. Sargents'[1] order, and not by the court, and that he denied any such thing in being, as governor and company of this colony and that

[1] Mr. *Sargent* was afterwards one of the Judges of the Special Court of Oyer and Terminer for the trial of the witches in 1692, in connexion with which he is mentioned in this work.

Col. Shrimpton is also further noticed in another part of this work.

he stood there to testify it and denied their power, and they might send him to prison if they pleased, which words, in the same manner, he repeated and sundry other seditious words and expressions as by the evidence will and may appear, thereby defaming the General Court and the County Court, and caused such a turmoil in the court as evidently tended to the high breach of his Majesty's government, &c."

It will be recollected that this was a time of great political excitement, and that Col. Shrimpton was among the leaders of one of the political parties. He was arrested upon this indictment, but from the changes that soon took place in the organization of the government or from some other cause that does not now appear, no final hearing was ever had of the case.

A case prior to this in time, is referred to in this connexion as showing the nature of what was punished, and the modes of punishment adopted under the colony laws. "At the court held at Hampton 1661, upon the complaint preferred against Edward Colcord at the General Court, referred to this court to hear and determine, this court having found him guilty of many misdemeanors and crimes, some against authority and some against persons in authority, some in cheating men in their estates, some in causing needless and vexatious suits in law, and other disturbances among the people, he is sentenced as followeth, viz. 1st, to pay a fine of five pounds to the treasurer of this county. 2d. To be committed to the house of correction at Boston nor there to be discharged unless there be a bond taken to the value of —— with sufficient sureties for his good behavior, and in particular that he sue no man at any time hereafter without putting in good security to satisfy the party sued what shall be recovered of him by authority from time to time, and costs."

This Edward Colcord seems to have been particularly obnoxious because of his litigious habits. He was sent for by the General Court to Hampton and was shut up in the house of correction in Boston, after having been sent to prison by the same court which had tried him as above stated, for refusing to acknowledge a deed of mortgage which he had executed. (Col. Rec.)

If my limits permitted, the instances that might be adduced from the records of the courts during this period, would show that no scruple was felt as to the power of hearing and determining upon all matters whatever, as well capital as inferior offences, and that the government at no time hesitated in carrying the sentences of the courts into effect.

Indeed if I were to attempt to do any thing like justice to this part of our subject, I should transcribe the provisions of those laws which, based upon the Mosaic code, bear the impress of cruelty, according to modern notions of a wise government, and should moreover transcribe, more at length than I have done, the multiplied forms of indictments which were framed from time to time to suit the real or fancied necessities of the body politic, in cases where the utmost latitude in construing indifferent acts into crimes was adopted by the courts.

But I pass to the less inviting field of the civil administration of justice in which, from the nature of the subject, the indulgence of the reader must be liberally taxed.

The cases which have been selected to illustrate the forms of judicial proceedings at different periods, will not be found curious or rare, nor have they been chosen on account of any peculiarity of interest which they were supposed to possess; and they are to be regarded rather as examples of forms, than as an exhibition of the judicial

learning or legal skill of the Bench or Bar at the times when the cases arose.

It may be observed, in passing, that in 1647 a question of jurisdiction having arisen in the case of an assault which took place in England, it was determined that in all personal actions, such as trespass, assault and battery and the like, where the cause of action arose in England and the parties removed into the colony, the courts here had jurisdiction. (Col. Rec.)[1]

Actions for the recovery of land, were generally "in case," though occasionally, towards the latter part of the time of which I am speaking, proceedings in ejectment were adopted.

Mr. Stearns has collected several of these actions in his treatise on Real Actions, (p. 491,) and I shall only insert one or two which are found in the Colony Records.

"Tucker and wife vs. Otis and Mansfield," (1658.) "In an action of the case for making use and withholding a certain piece of meadow which was part of the meadow given to William Norton, deceased, formerly the husband of said Anne Tucker, which meadow was given the said Norton by the town of Hingham." (Col. Rec.)

"John White, sen. of Hartford in the colony of Connecticut, *administrator* to the estate of Stephen Taylor, deceased, plaintiff, per contra, Samuel Partrige of Hadley, defendant. In an action of the case for unjustly detaining a certain mansion with the house lot, formerly in tenure of the said Taylor and by the court disposed, as security

[1] In 1647 a law was passed authorizing the assignment of any "bill or other specialty," if made "upon the back side of the bill or specialty," and making it lawful for the assignee to sue for and recover the debt "as fully as the original creditor might have done." (Col. Laws, ed. 1660, p. 5.) Is not this the origin of our common law as to the negotiability of bills of exchange and promissory notes, rather than the adoption of the statute of Anne?

of the heirs portion, to a surrender of the said house and land with just damages. The testimonies and evidence in the case being produced and read in court, were transferred to the jury, who brought in their verdict that they found for the plaintiff the tenement he here sues for, now in the tenure of Samuel Partrige." (Bliss' Address.)

Debt and case were convertible forms of action for the recovery of moneys due as well upon simple contracts, as bonds and other specialties. So *case* for trespass was sustained, and *case* upon mortgages was a form adopted and in use as early as 1649.

"Mr. George Keith, merchant, plaintiff, *per contra*, Edward Church, defendant, in an action of *the case* for detaining a just debt due from said Church by book to the said Keith, for merchandize delivered by the said Keith to his servant T. B. at his order. The sum due is £2 16s. with all just damages, according to attachment. In the action depending in the court between Mr. George Keith, plaintiff, and Edward Church, defendant, the testimony and evidences in the case being produced and read in court were transferred to the jury, who brought in their verdict that they found for the defendant costs of court." (Bliss' Address.)

"The worshipful Maj. Pynchon, plaintiff, contra the estate of Florence Driscoll in an action of *debt* due by book with damages to the value of eight pounds, according to attachment."

The jury found for the plaintiff, damages and costs. (Ib.)

"At a Court holden at Springfield, Sept. 27, 1659 Samuel Allen of Northampton, plaintiff vs. John Bliss of the same town defendant, in an action of the case for unjustly stealing away the affections of Hannah Woodford, his espoused wife, damnifying the said Samuel to the value of £50. In this cause the plaintiff withdrew his action be-

fore the case was tried for that he found himself defective in his testimony." (Ib.)

So case instead of covenant broken was adopted for the recovery of damages by reason of a breach of the covenants in a deed, as in the case of Ela vs. Clement, Essex Co. March 1686.

It was 'case' and the declaration after reciting the covenant proceeds "but the said Clement hath not made good to the said Ela the land specified in said deed, nor secured him from the heirs of Mr. Robert Clement deceased as specified in said deed more largely, but hath suffered the said Ela to be molested and interrupted in the peaceable and quiet possession and improvement of said land, as will appear by testimony, whereby the plaintiff has been damnified *about seven or eight pounds* in silver, besides the disparagement of his title to his land bo't of the above said Clement and loss of paid of the land &c."

Replevin was in use as early, certainly, as 1654, for I find among the colony records of that year the following writ. "To the Marshall of the County of Yorkshire or his Deputy. You are requested to replevy the goods of Mr. Shapleigh attached by Mr. Gunnison or any other, to the value of one hundred and twenty pounds, provided that Mr. Shapleigh give bond to the value of two hundred pounds, with sufficient surety or sureties to prosecute his replevy at the next court holden in and for the county of York, and from court to court till the case is ended, and to pay such costs and damages as the said Gunnison, by law, shall recover against him."

The return on the writ gives the name and number of the articles replevied, and the persons by whom appraised, and the prices at which they were appraised by these persons under oath.

I transcribe, somewhat at length, the record of a single case in order to show among other things, the manner in

which the testimony was taken and preserved as was then required to be done. The case here selected is one of the shortest that has fallen under my observation. The case is Johnson vs. Viall. The writ was, "To the Marshall of the County of Suffolk or his Deputy. You are requested to attach the goods, and for want thereof the body of John Viall and take bond of him to the value of thirty pounds, with sufficient security, for his appearance at the next County Court to be holden at Charlestown, to answer the complaint of John Johnson in an action of the case, for over-reaching him in a bargain in building him the frame of a dwelling house, and due damages, and so make a true return hereof under your hand dated 11th 10th mo. 1657.

By the court, Jona. Negus.

At a County Court held at Charlestown December 29, 1656, John Johnson, plaintiff against John Viall, defendant, in an action of the case for over-reaching him in a bargain for building him a frame of a dwelling house and due damages. The Jury having heard the pleas and evidences presented by both parties, which are on file with the records of this court, they find for the defendant costs of court eight shillings and one penny.

The Magistrates judge not meet to accept of the Jury's verdict."

Then follows a copy of the agreement declared on, and next in order was the evidence in the following form. "This is to certify the honored court that we whose names are underwritten were requested and warned to appear at the court to testify the Court what such of the frame as goodman Viall had of goodman Johnson, what it was worth, because goodman Johnson did offer good man Viall to take seven pounds less than two sufficient workmen did appraise the frame at. Now we having taken

views of this frame, we find it to be little worth than six and twenty pounds and unto this we put out hands.

ISAAC CULLEMORE.

WM. SIMMONS his — Mark.

Sworn in court by Isaac Cullemore and Wm. Simmons the 29th of December, 1657.

THOMAS DANFORTH, Recorder.

Esdras Head about 57 years of age testifieth that he being with John Johnson and John Viall to speak with John Viall about a frame of a house that the said John Johnson built for John Viall, the said Esdras heard John Johnson offer John Viall that they would take two men to prize the frame and what they should judge it worth, that he would take seven pounds less than they should judge it to be worth.

Sworn in court by Esdras Head the 29th 10th mo. 1657.

Thos. Danforth, Recorder.

Wm. Locke aged 28 years or thereabout, testifieth that about the 28th of the 9th mo., he being in company with goodman Viall and John Johnson he did hear John Johnson tender the said Viall, that if he would take two sufficient workmen and prize the house that is now in controversy, what they should prize it at, that said Johnson would take seven pounds less and further saith not.

Sworn in Court by Wm. Locke the 29th of the 10th mo. 1657, as attest, Thomas Danforth Recorder."

Indorsed on the backside of the attachment "I have attached the body of John Viall the 22 10th mo. and have taken bond of him, to the value of thirty pounds pr me,

Ri. Wayte Marshall."

Then follows the bond which is made to the Marshall, conditioned to appear at Court and answer to the complaint of the plaintiff and the bond was given without sureties.

Following these copies of the record of the Inferior

Court, is the record of the proceedings before the General Court to which the case was carried, as the Magistrates and Jury disagreed.

"The Deputies think meet to hear this case the next fifth day by eight of the clock in the morning if the Hon. Magistrates consent thereto."

28—3—58 Wm. Torrey Clerk.

"Consented to by the Magistrates,
Edward Rawson Secy."

"In the case John Johnson plaintiff and John Viall defendant, the Magistrates having heard the evidences in the case, as a final issue agree, they find for the defendant costs of court if their brethren the Deputies consent hereunto June 16—58. Edward Rawson.

Consented to by the Deputies.
Wm. Torrey Clerk."

The foregoing record will serve also to explain the mode of bringing causes into the Assistant's or General Court from an inferior tribunal and of trying the cause there. A few examples of the form of these proceedings are subjoined for the purposes of explanation, although perhaps they have already been extended to an unreasonable length.

1673. "Anthony Checkley attorney to Theodore Atkinson senr., in behalf of his daughter Abigail Atkinson plaintiff vs. John Williams defendant, in an action of appeal from the judgment of the last County Court in &c. After the attachment, court's Judgment, reasons of appeal and evidence in the case presented, were read, committed to the Jury and remained on file with the records of this court, the Jury brought in their verdict. They found a special verdict i. e. that in case this deed of gift from Theodore Atkinson Senr. to his children be good in law, then we find for plaintiff, but if not—then we find for defen-

dant costs of court. The Magistrates find for defendant costs of court &c. five shillings."

1674. "Lattimer vs. James—After the attachment, Court's Judgment, reasons of appeal, evidences in the case produced, were read, committed to the Jury, entered on file of the records of this court, the Jury brought in their verdict, they found for the plaintiff reversion of the former judgment and costs of court."

"This case was thereupon, by consent of parties, referred to the hearing and determination of the Selectmen of Salem with Mr. Thomas Laighton of Lynn[1], and for that end Major Hathorn is to appoint time and place of meeting, and all parties concerned are to attend the meeting and give in their pleas accordingly, and that their determination be returned under at least the major part of their hands into the next General Court for their settlement thereof."

1680. "Launcelot Lake, Master of Arts, student in Physic plaintiff, contra George Penney Commander of the Unity of London defendant, in an action of the case for that the aforesaid Penney did after an inhuman manner vilify and abuse him the said Lake by slandering of him, saying that he was a witch and a wizard *etcetera* according to attachment. The attachment and evidence in the case produced, being read and committed to the Jury, which are on file, the Jury brought in their verdict. They found for the plaintiff forty pounds damage or that the defendant make an acknowledgment in open court, to the satisfaction of the court, and the costs of court allowed at fifty shillings and four pence." (Suff. Rec.)

It has already been remarked that the Court of Assis-

[1] Laughton commonly called Laighton was many years a representative from Lynn in the General Court. He died in 1697.

Maj. Hathorn will be more fully noticed in another part of this work.

tants held admiralty jurisdiction and among other things had cognizance of the crime of piracy.

The mode of calling the court together for admiralty purposes seems to have been somewhat peculiar. Thus in 1686, "at a Court of Assistants or admiralty held at Boston on the 15th April. The court met at the time, at the request of Mr. William Woodrow of the Island of St. Christopher, now resident of Boston. A Court of Admiralty is granted him against Mr. John Keith of Boston. Court to be holden on the 22d instant, he, the said Woodrow giving in his libel caution, seasonably &c." (Suff. Rec.)

A trial which excited great interest at the time of its being had (1644,) will also serve to show how little the courts regarded the distinction between admiralty and common law proceedings in determining questions that came before them. The case was that wherein the chivalrous Lady La Tour wife of the Governor of Nova Scotia, was plaintiff and Bayley and Berkley were defendants, the one being the master and the other the consignee of a vessel which she had chartered in London to carry her to the River St. John's where her husband had a Fort.

The ground of the action was a breach of the charter party, arising from the great delay of the master in completing his voyage, having spent six months after leaving London, before he reached Boston.

The case was tried at a special Court of Assistants before a jury who gave the Lady £2000 damages. An execution issued upon this judgment under which the cargo of the vessel was seized. The master claimed to hold the goods for the payment of freight and seamen's wages, and this question was submitted to a jury and decided against him.

The defendants then appealed to the General Court

where the right of the master to retain the goods was again considered, and the two branches divided in opinion, the Deputies and Deputy Governor being in favor of the master and the major part of the Magistrates against his claim.

The result of the suit was, that Madame La Tour prevailed and carried off the goods to Nova Scotia in vessels that she chartered for the purpose in Boston.

2 Wint. Jour. 198—200—201.

The custom of confessing judgment for the purpose of preventing suits was in use under the colony charter, and seems to have been somewhat peculiar in its forms and its effects. Thus in 1680, "Joseph Lawrence of Boston personally appearing before the Hon. Simon Bradstreet Esq. Governor, and William Stoughton Esq. Assistant, Jany. 1680, confessed judgment against his estate and person unto John Saffin of said Boston, for £15 in money in *full of a bill of* £90 18s, *and all accounts between them.*

Attest Isaac Addington Clerk.

Execution issued pro. June 1681." (Suf. Rec.)

Another custom, still retained by our courts, may be traced to an early statute—that of calling plaintiff or defendant *three* times before entering a nonsuit or default in an action.

The necessity of some law on the subject arose from a custom that had become prevalent, of the parties waiting until sent for specially by the court, before being ready for trial which occasioned great delay; a law was thereupon passed, that if the plaintiff did not appear and prosecute his action immediately after he had been "three times called in court by name, after the first forenoon of the court," he should be nonsuited, &c. with a provision for costs in favor of the party that appeared, against the one who failed to answer the call. If the party delinquent

upon such call had been summoned and made default in a criminal process, he was to be "proceeded against for contempt." (Col. L. Ed. 1660 p. 48.)

If any one has followed these illustrations thus far with any other view than to trace to authentic sources, the dry and uninteresting forms of business as they once existed, he must have been wearied with the extent to which the cases cited from the colony and court records, have reached. The apology for this, if any is due, must be that a work professing to treat of the judicial history of the Commonwealth would obviously have been incomplete without some such detail as I have ventured here to offer to the reader.

CHAPTER IV.

Personal Notices of the Colonial Governors, &c.

As it was the original purpose of this work not only to enumerate the changes through which the jurisprudence of Massachusetts had passed, but to notice those who had been instrumental in working out those changes, I have thought this period of these sketches could not be completed without giving more at length than I have hitherto done, an account of those who, as Governors of the colony, took a leading part in its judicial as well as legislative and executive concerns.

The Governor, for the time being, was accustomed to sit with the Assistants while acting as a Court of Justice, and although it does not appear that he had any peculiar power or duty as a member of this tribunal, it is easy to conceive that from a regard to the dignity of his office, the influence of his opinion in judicial matters must have been felt and acknowledged to no inconsiderable extent.

The first of these, in order, was JOHN WINTHROP, who has properly been styled the "Father of the Colony."

Of him it is not proposed to speak farther than the notices extend which are accessible to every reader.

He was born at Groton, Eng. Jany. 12, 1587, and was educated for the Bar. He possessed a fine estate which he converted into money in order to remove to America. He came to New England as has already been stated, with the colony, in 1630 having been chosen its Governor, before he left England. At this time he was forty three

years of age. As a Magistrate he was firm, upright, wise and prudent. He was distinguished for his piety, and yielding to the spirit of the age and of those around him, towards the latter part of his administration, became less tolerant in his feelings than when he left England. Though he was a strenuous supporter of what he believed to be true civil liberty, his opinions underwent a great change in regard to a popular government, and adverse to the claims of a Democracy.

In private life he was frugal, benevolent and kind. He devoted himself so assiduously to the affairs of the colony, that his own were sacrificed, and his large estate thereby became wholly wasted. He left a faithful journal of the events that occurred in the colony during his life which, with the additions made to it by the faithful and indefatigable labors of its distinguished editor, furnishes a rich store house of facts "illustrative of the early history of the Commonwealth." No one can read the journal of Gov. Winthrop without admiring the meekness, candor and forbearance with which he met the frequent reverses of popular favor, as well as the pious resignation with which he bore his own domestic afflictions.

He experienced the fickleness of a people's friendship, but he never shrunk from his duty to the colony, nor relaxed in his zeal for her prosperity. He died March 26, 1649, in the sixty third year of his age, worn out by toils and depressed by afflictions. He had been Governor of the colony from the year 1630 to 1634 and during the years 1637, 1638, 1639, 1642, 1643, 1646, 1647, and 1648.

His son John Winthrop was Governor of Connecticut. His grandson Wait Winthrop, son of the governor of Connecticut, was Chief Justice of the Superior Court of Massachusetts. Another grandson, Fitz John, was also Governor of Connecticut. And his descendants have been

among the most distinguished of the men of New England.

THOMAS DUDLEY was the next Governor, in order of time. He was born at Northampton, Eng. 1576. He was bred to the army, and in 1597 was a captain at the seige of Amiens. For two years he was the steward of the Earl of Lincoln. He became a non-conformist under the preaching of Dodd and other puritan Divines, and came to New England with Winthrop in 1630. Mr. Humfrey who had been chosen Deputy Governor, declined embarking and Dudley was chosen in his place. He was then 54 years of age but of vigorous body and well fitted to encounter hardships and fatigue. In 1634 he was chosen Governor of the colony. In character and learning there was a marked difference between Dudley and Winthrop. He was upright and honest in his purposes, but blunt and severe in his manners. In profession and practice he was opposed to any thing like toleration, never yielding his own opinion or submitting to that of others. He took a warm and decided part in the Antinomian controversy, so famous in his day, against Mrs. Hutchinson and her followers.

In 1644 the office of Major-General of the colonial troops was created and Dudley was appointed to fill it. He was Governor during the years of 1634, 1640, 1645 and 1650, and was constantly in the Magistracy either as Governor, Deputy Governor or Assistant from his arrival in the colony till his death, which took place July 31, 1653 at the age of 77. He left the following metrical lines which are said to have described his character with great accuracy.

"Let men of God in Courts and Churches watch
O'er such as do a *Toleration* hatch,
Lest that ill egg bring forth a cockatrice

To poison all with heresy and vice.
If men be left or otherwise combine,
My Epitaph 's, I die no libertine."

His residence was in Roxbury. His family and descendants were long distinguished in Massachusetts. His son Joseph was Chief Justice and afterwards Governor of the Province. His daughter Anne was distinguished in her day as a poetess, and married Gov. Bradstreet. His grandson Paul Dudley was Attorney General and afterwards Chief Justice of the Province, and another grandson Col. William Dudley was a leading man in the Province, and sustained many important offices in the government.

JOHN HAYNES was the third Governor in order of time. He came into the colony with the Rev. Mr. Hooker, and settled at Newtown, now Cambridge, in 1633. He was born in Essex, Eng. The next year after his arrival he was chosen one of the Assistants, and in 1635 was elected Governor. The following year he removed with the Rev. Mr. Hooker to Connecticut and became the first Governor of that colony. He was re-elected to that office as often as he was eligible by the charter of the colony until his death in 1654. He was deservedly extremely popular while in Massachusetts, which is said to have been one reason why the General Court consented to his and Mr. Hooker's removal with his congregation to Hartford. "He was fortunate, says Mr. Savage, in being Governor of Massachusetts, but more fortunate in removing after his first year of office, thereby avoiding our bitter contentions, to become the father of the new colony of Connecticut."

He was distinguished for his abilities, prudence and piety, and was ranked as an equal of Gov. Winthrop. He left a son who was a minister in Hartford, but the family is now said to be extinct.

Next to Gov. Haynes in point of time was HENRY VANE,

a man that filled a much larger space in the old world than in the annals of the new. His fame has been recently redeemed from partial oblivion by the labors of the Rev. Mr. Upham, from whose life of him I have borrowed my dates, and to which I would refer every one who may desire to know more fully the history of this remarkable man.

He was the son of Sir Henry Vane who was a member of the King's privy council. He was educated at Cambridge, Eng. and afterwards went to Geneva, where he became a non-conformist and of course a republican. On his return to London he became dissatisfied with the state of things which he found there, and obtained leave to visit New England. He arrived here in company with Gov. Winthrop's son, in the early part of 1635. At that time he was 23 years of age, and in March of the same year was admitted as a freeman of the colony. He early took a decided stand in favor of Mr. Wheelwright in the famous Antinomian controversy in which the people of the colony were engaged, and commended himself to the people by his serious deportment and professions. So great was his popularity, that at the election in 1636 he was chosen Governor although then but 24 years of age. His administration was, however, unquiet, and his popularity greatly impaired. The next year, Gov. Winthrop was re-chosen, and Vane was elected a Deputy from Boston, but soon returned to England to take a leading part in the events that were about to distinguish the political history of that government.

In 1640 he was returned to Parliament from Kingston upon Hull, and soon became one of the leaders in that body. He belonged to the party that opposed the King, although he was opposed to the execution of Charles, and resisted the usurpation of Cromwell, upon whose accession to power he retired to private life at his seat at Raby

Castle. After the death of Cromwell he was again elected to Parliament from Kingston upon Hull, but was not admitted to his seat. He was also elected from Bristol, but was refused his seat, and at last was returned from Whitechurch in Hampshire. In this Parliament he opposed the succession of Richard as Protector, and defeated it. He was then made one of the council of state to whom the executive power was delegated until the restoration of Charles. In 1662 he was arraigned for high treason and of course was convicted. He was executed June 14, 1662 at the age of 50.

He always retained a strong regard for the colony, although he ceased to have any immediate connexion with it after leaving New England in 1637.

Few men have suffered more from the injustice of history than Sir Henry Vane, and few were ever placed in situations more trying to character than those in which he performed a leading part in the great events of his day. Hume, though opposed to the principles and opinions of Vane, has done justice to his conduct in the last hours of his life. "His courage deserted him not. In all his behavior there appeared a firm and animated intrepidity, and he considered death but as a passage to that eternal felicity which he believed to be prepared for him."

Richard Bellingham was first chosen Governor in 1641. He was one of the original Patentees, and belonged to a good family in England. He was educated to the Bar, and ranked high among the learned men of the colony. He was eminent for piety and incorruptible integrity. In politics he belonged to the liberal party, and although severe towards the Quakers and Baptists, he seems to have been as liberal as the age in which he lived allowed him to be. He first came into the colony in 1634, and was made Deputy Governor the following year. In 1654

he was chosen Governor a second time, and in 1664 was made Major General of the colonial troops. In 1665 he was again chosen Governor and was re-elected from year to year until his death in 1672, at the age of 80 years. He was the last survivor of the original Patentees named in the colony charter. He had been thirteen years Deputy Governor and ten years Governor of the colony. He was the brother of Anne Hibbins, who suffered for witchcraft in 1656. Gov. Winthrop relates a singular story of Gov. Bellingham's second marriage which took place in 1641.

The young woman who became his wife was about to be married to a friend of his who lodged at his house, when suddenly, "the Governor treated with her and obtained her for himself." A courtship thus began was consummated by the Governor's marrying himself, without first publishing the banns as required by law. For this he was presented by the grand jury. The Secretary called on him "to answer the prosecution" but the Governor being disinclined to be tried, declined leaving the bench, and as there were but few of the magistrates present, it seems that he escaped both trial and punishment. Mr. Savage says "it is out of my power to ascertain the name of the young gentlewoman who jilted the friend of the Governor to obtain a more dignified establishment."

Although educated as a lawyer, he made his own will so defectively that it was set aside by the General Court, and his large estate was distributed by law.

Gov. Bellingham was buried in the Granary Burying ground in Boston, and upon his tomb is this just eulogium.

"Virtue's fast friend within this tomb doth lie,
A foe to bribes, but rich in charity."

JOHN ENDICOTT was first chosen Governor in 1644. He was born in Dorchester, (Eng.) and became one of the

original purchasers of Massachusetts Bay from the Plymouth Company. He was sent over in 1628 with a small colony to settle Salem, and was considered as its Governor. He resided there till near his death when he removed to Boston. He was a man of great courage and firmness, with an ardent temperament, but bigoted in his religious opinions, and rigid, in the extreme, in enforcing his own peculiar sentiments. He persecuted the Quakers and Baptists, and made bitter war against long hair and wigs, and especially against women going to church unveiled.

Among other instances of his bigotry was the cutting out of the Cross from the Royal Standard, because it savored of Popish superstition. For this act he was suspended from the Magistracy for the term of one year. At one time he commanded a company of men in the war with the Pequods, but with no great credit or success. Although opposed to Gov. Winthrop he had a good share of popularity with the freemen. 1641 he was elected Deputy Governor, and in 1645 was made Major General of the troops, in place of Dudley who was then chosen Governor.

In 1649, he was again elected Governor over Dudley who was the opposing candidate, and from 1651 to 1654 was annually chosen. From 1655 till his death he was elected every year to that office, making in the whole sixteen years that he held the office of governor, being a longer term than any other person held it under the old charter.

He died March 15, 1665 at the age of 75 years leaving two sons.

Although not so learned as Winthrop or Bellingham, he was not deficient in practical knowledge, and great allowances should be made for the embarrassing circumstances in which he was placed. He was never a favorite of the King,

and had many bitter and powerful enemies in the colony. The spirit of persecution and intolerance was ripe in the colony, and it is unfortunate for the fame of Endicott that four victims of this spirit were put to death during his administration in 1649, for the crime of heresy.

JOHN LEVERETT was first chosen Governor in 1673. He arrived in the colony from Boston, England, with his father, Elder Thomas Leverett, in 1633. He was employed by the colony in a military capacity, and signalized himself by his bravery. In 1642 he was a commissioner to visit the Narraganset Indians, and in 1653 received a commission from Cromwell to raise troops to march against the Dutch at Manhadoes. In 1663 he was speaker of the House of Deputies, and in 1664 was chosen Major General of the colony troops. The next year he was chosen an Assistant, and in 1671 was made Deputy Governor. On the death of Gov. Bellingham he was chosen in his place, and was annually re-elected till 1678 when he was succeeded by Governor Bradstreet. He was consequently Governor during that most perilous period of New England's history, Philip's War, and his military talents and experience fitted him to sustain the place with honor and distinguished success. He was so much respected in his office, and so popular as a man, that his election was never contested. But this popularity seems to have been impaired among our democratic ancestors, by the circumstance that in 1676 he received the distinction of Knighthood from the King, for, the next year after this was known, Gov. Bradstreet was chosen in his place. He was the first Governor of Massachusetts who had received this mark of distinction from the King.

He died March 16, 1679, leaving a son, Hudson Leverett, who maintained but an indifferent character. His grandson John, son of Hudson, however, became one of

the most distinguished men in New England, and for sixteen years held the office of President of Harvard College with eminent ability and honor.

Simon Bradstreet was the last of the Governors under the old charter. He was born in Horbling, Lincolnshire, Eng. in 1603, and was the son of a clergyman. He was for one year a member of Emanuel College in Cambridge, and seems to have been in part educated for the Bar. He was the successor of Dudley as Steward of the Earl of Lincoln. In 1630 he came to New England as one of the Assistants, and was continued in the Magistracy until he was elected Deputy Governor in May 1673. He was chosen Governor in 1679, when he was 76 years of age.

His first wife was the daughter of Gov. Dudley whom he married before leaving England. She was the earliest poet in New England, and a volume of her poems, printed in 1642 was the first book of poetry published in America. His second wife was the daughter of Emanuel Downing, and sister of Sir George Downing so distinguished in English history.

He resided in Ipswich and in Andover awhile, but afterwards removed to Boston, where he lived till 1692 when he removed to Salem.

From 1630 to 1643 he was Secretary of the colony. In 1662 he was sent with Mr. Norton to England as colonial agent, and to congratulate King Charles 2d upon his restoration. They performed their trust with fidelity, but lost much of their popularity by yielding to the royal demand, that church membership should no longer be a necessary qualification towards becoming a freeman, and that the people should have a right to make use of the liturgy.

In 1673, he was chosen Deputy Governor and held that place till his election as Governor in 1679, when he was succeeded in the former office by Thomas Danforth.

At this time a great excitement prevailed in the colony in relation to the measures which the crown was taking to rescind its charter and curtail the rights which the colonists had enjoyed under it. Danforth led the popular party, while Bradstreet was more moderate in his politics. The popular leaders were for holding on upon the charter at all hazards, while the royalist party, at the head of which were Dudley and Stoughton, were for yielding to the demands of the crown. Gookin and Cooke acted with Danforth, while Bradstreet took a middle course, although he thought it best for the colony to surrender their charter.

In 1685 and 1686 he was re-elected Governor, but by a very diminished vote, Danforth having almost as many votes as himself. He consequently was in the office of chief magistrate when Dudley's commission as President arrived, May 15, 1686.

Bradstreet was named as one of Dudley's council, but declined serving, and retired from all participation in the government.

At the breaking out of the Revolution in 1689, he was placed by the people, at the head of the committee of safety which consisted among others, of the magistrates who had been displaced on the arrival of Dudley's commission. The old charter was thereupon formally resumed, and Bradstreet was chosen Governor again, by the people. He was continued in office till the arrival of Gov. Phipps, who had been appointed under the new charter, in 1692. He then retired from public life and died at Salem in 1697, at the age of 94.

Although not distinguished for talents, he was an upright magistrate and an estimable man. He was intolerant towards the Quakers and Baptists, but was liberal in his political principles, and had sense and magnanimity enough to oppose the popular and all pervading delusion

in regard to witchcraft which produced such disastrous consequences under Gov. Phipps' administration. The following extract from his epitaph unlike most epitaphs, may be regarded as a faithful picture of his character. "He was a man of deep discernment, whom neither wealth nor honor could allure from duty. He poised with an equal balance the authority of the King and the liberty of the people. Sincere in his religion, and pure in his life, he overcame and left the world."

I have thus briefly enumerated the several persons who performed the multifarious duties of Governor of the Massachusetts colony under the old charter, but I cannot dismiss this part of my subject without noticing those whose names as Secretaries of the colony, are so often met with in making researches among the records of its judicial proceedings.

The first Secretary of the Company was *John Washburn*, but as he never came to New England we have little to do with his history.

At the election in 1628, he was succeeded by *Wm. Burgess*. But the first colonial Secretary whom there is any occasion to mention, was Simon Bradstreet who as already stated held the office from 1630 to 1643.

He was succeeded by *Increase Nowell* who held the office till 1649. He was originally one of the assistants and a man of very considerable consequence in the colony. He came to New England with Gov. Winthrop, and was made a ruling elder of the church in Charlestown, but gave up the office as being inconsistent with his holding civil office. In 1649 he joined an association consisting of Endicott, Bradstreet and others for the purpose of suppressing the wearing of long hair, because of its corrupting tendency upon society. He continued to be an assistant till his death which occurred Nov. 1, 1655.

Edward Rawson succeeded Nowell as Secretary, and held the office by successive annual elections till the dissolution of the government under the old charter. Though not distinguished for talents, the fact of his having been so long retained in this office by annual elections, shows that he was held in high estimation both by the people and the government. He was born in Gillingham, Dorsetshire, about 1615, and came to New England in 1637, when he settled in Newbury. He removed to Boston in 1650, but the time of his death I have not ascertained.

It is neither within the limits nor the original design of this work, to give the history of those measures which resulted in wresting from the colony her cherished charter. Where a government like that of England, as it then was, finds it for its interest to accomplish any purpose, it is easy to find or make pretences for undertaking the work. In the case of the English colonies, especially that of Massachusetts Bay, it was not difficult to discover grounds upon which to rest charges which would serve as an apology for seizing their franchises and rendering them subservient to the crown. Massachusetts had grown under the neglect of the mother country, to be an object of cupidity to the crown, and the very degree of freedom and independence which she enjoyed, rendered it expedient, to say the least, that these should be reduced more nearly to the scale of royal prerogative than could meet the approbation of the colonists. They acknowledged no standard but their own charter, and to this they clung as to the very ark of their liberties. But with a prerogative in the crown well nigh unlimited, with a judiciary subservient to the will of that crown, and with the supple and obsequious tools of power which such a government can always command, it was not difficult to devise means of robbing a feeble colony of whatever stood in the way of

royalty. The result was that under the *forms* of legal process, but at the sacrifice of all pretence of equity or fair dealing, this charter was declared to be forfeited, and the fabric of government which had been reared upon it was prostrated.

Although in tracing that branch of the government which was connected with the administration of justice, and in confining myself to this department, I have been excluded from the most interesting incidents of our early history, I would still hope that the facts and illustrations which have been thus gleaned, will not be without their use, even to the general reader.

Posterity may derive wisdom from the experience of the early colonists, but so far as a judicial system is concerned, it must rather be from what they had not, than from the perfection of any thing they had. Their whole system was in its infancy, and the result of experiment rather than any wisdom or forecast in those who framed it. Ingenuous minds, will never cease to admire the character of the Puritan Fathers of New England, but it was in other spheres than that of jurisprudence that their virtues and their sagacity shone pre-eminent. The spirit which they infused into all their institutions, it is true, was a seed which though crushed for a while under the weight of the royal prerogative, sprung up at last in the fair and beautiful proportions which civil liberty has assumed in the land of the Pilgrims; but so far as the administration of justice was concerned, it was the reflected rather than the direct influence of this spirit which, in the absence of all settled rules of law, guarded the rights of the citizen, and spread its protecting shield over the interests of the body politic.

CHAPTER V.

The Colony during the Administration of President Dudley.

The judgment vacating the colony charter was entered up in Chancery, on the 18th of June 1684, and a copy of it was received by the Colony Secretary, Edward Rawson, on the 2d July, 1685. The King thereupon assumed the right of appointing a Governor for the province, and a commission was granted to Joseph Dudley to act as *President*, not only of Massachusetts Bay, but of New Hampshire, Maine and the Narraganset country, or King's Province. William Stoughton was commissioned as Deputy President, and fifteen persons were named as Councillors, to act with and advise the President, in matters of government.

The President's commission was received by the Rose Frigate, May 15, 1686.

It is said that this commission was procured by the interposition of "one Randall," [2 Ser. Hist. Col. 2, p. 106.] but the manner of his agency is not explained.

The Council named were Simon Bradstreet, Robert Mason, John Fitz Winthrop, John Pynchon, Peter Bulkley, Edward Randolph, Wait Winthrop, Richard Wharton, John Usher, Nathaniel Saltonstal, Bartholomew Gidney, Jonathan Tyng, Dudley Bradstreet, John Hicks and Edward Tyng. Of these, Saltonstal and the two Bradstreets declined serving under this appointment. The establish-

ment of the government of the colony under this form, was understood to be merely temporary, until a more permanent system should be devised. The Governor and Council had, properly, no legislative power, beyond, perhaps, establishing necessary courts of justice. They were made a Court of Record for the trial of civil and criminal matters, and had authority to appoint judges of such inferior courts as they might create, as well as other officers of those courts, and were moreover clothed with the executive powers of the government. (Chalm. 417.)

The judicial system under Dudley, consisted of a Superior Court, comprising the majority of the Council, and "Courts of Pleas and Sessions of the Peace," in the several counties.

The Territory was divided into four counties, viz. Suffolk, Essex, Hampshire and Middlesex, and three Provinces, viz. New Hampshire, Maine and the King's Province. (1 Belk. 118, 1 Hutch. 315—16.)

The former laws and customs as to judicial proceedings were continued, and all matters as well of admiralty as of common law were determined by jury. The mode of returning jurors was somewhat changed from the former system. They were now selected by the Marshal and one Justice of the county, pricking their names upon a list returned to them by the Selectmen of the several towns.

The Superior Court held three sessions in a year, and sat only in Boston. (1 Williamson's Maine, 587.)

The President took upon himself the Probate jurisdiction as Supreme Ordinary, but to save the trouble of parties attending at Boston, he appointed Judges of Probate and clerks in the remote counties, to act in his stead.

I have not ascertained the precise time when the judicial system went into operation under President Dudley.

The County Courts were not established until the 26th July 1686. Previous to that, however, an Attorney General had been created, and from a communication made by him to the President and Council, it would seem that inconveniences had already arisen in the mode of administering justice then in use.

The President and Council seem to have acted somewhat under the direction of Bullivant in the orders they passed relative to the court. His suggestions were that they should publish all the names of the persons whom they might appoint to act as Attorneys of the courts, and what their fees might be. In the next place that they should determine whether any but such Attorneys should practice in the courts, "albeit by law any are admitted to plead their own case." In the third place, that no information should be received by the court where the King was the principal party, unless it was drawn or signed by the King's Attorney. That they should settle the fees of the Attorney General, and by whom they should be paid, "for drawing, signing and pleading" such informations. That the fees of the Register of the Court of Admiralty should be determined and that Jurors should be summoned by the Marshals. (St. Rec.)

On the 26th July the following order was passed. "The President and Council of his Majesty's Territory and dominion of New England having considered the necessity of appointing a particular person to preside as Judge in the several County Courts, that may be certainly present for the direction of the court, and performing the necessary service proper for a Judge of the court, William Stoughton, Esq., Deputy President, is hereby intreated and empowered to take charge and care of the several courts of the Counties of Suffolk, Middlesex and Essex for

which service the President and Council will seasonably take care that there be a reward assigned." (Suff. Rec.)

It was further "ordered that John Richards and Simon Lynde, upon taking the oath appointed by the President and Council, be Assistants to William Stoughton, Esq. Judge, the next Court of Pleas and Sessions of the peace to be holden at Boston, July 27, 1686."

The system so far as County Courts were concerned, seems to have been based upon the constitution of those courts, as it had existed under the colony charter, for we find the Magistrates or Councillors sitting in those courts as they had heretofore done, notwithstanding the appointment of a presiding and assistant Judges. Thus, the first court of "Pleas and Sessions" after the foregoing order, and the first that I have ascertained, which was held under Dudley's administration, convened on the 27th July, 1686, and consisted of William Stoughton, "Judge" John Pynchon, Wait Winthrop, Edward Randolph, Richard Wharton, John Usher, Esquire, and John Richards and Simon Lynde "Assistants."

At subsequent terms of these courts sometimes two and sometimes three of the Council sat with the Judge, and the Assistants. The last term in Suffolk being held Oct. 26th, 1686.

Appeals lay from the County Courts to the President and Council, and in certain cases from their decision to the King in Council.

The admission of Attorneys was regulated by an order passed on the 26th July, 1686 and a form of oath prescribed to be taken by them before entering upon their profession. Bullivant was again appointed Attorney General and Giles Masters, Anthony Checkley, Mr. John Watson, Capt. Nathaniel Thomas and Mr. Christopher Webb were admitted and sworn as Attorneys. The oath was in most re-

spects similar to that subsequently adopted in 1701, and, until recently, administered to all Attorneys on their admission, with the exception of one clause which was probably called for by the recent adoption of a fee table and was as follows, "you shall increase no fees but be contented with such fees as are by order of Council or of the Judge of this court (the Superior Court,) allowed you in time to come. You shall plead no plea, nor sue any suits unlawfully, to hurt any man, but such as shall stand with the order of the law and your own conscience."[1]

Randolph had received the appointment of Secretary in Sept. 1685, and there does not appear to have been any distinct clerk of the Superior Court until Nov. 2, 1686, when Bullivant was appointed and took the oath of that office which is regularly entered upon the records of the court.

The executive officer of the court was called the Provost Marshal, which name after the arrival of Andros was changed to *Sheriff*.

Besides the regular terms of the Superior Court, sitting as "a court of appeals, grand assize and general jail delivery," there were from time to time special terms of Oyer and Terminer held by the President, Deputy President and members of the Council. And the various courts and officers just enumerated constituted, I believe, the judicial system of the colony so long as Dudley remained in power.

I have looked into most of the few records that remain of the judicial proceedings of that period, and by a reference to these it will be perceived that more systematic forms of proceeding had begun to be adopted, although

[1] I find under this date in Judge Sewall's Journal "Mr. Stoughton prays excellently and makes a notable speech at the opening of the court. Foreman of the Grand Jury sworn laying hand on the Bible. Others sworn by lifting up hands. Attorneys sworn and none must plead as Attorneys but they."

they were probably deficient in technical accuracy. I cannot however discover that there was any one connected with the court, who had been educated as a lawyer. The case of Cook vs. Paige which was determined at the Nov. term of the Superior Court, 1686, having been brought there by appeal from the County Court, presents a more correct form of proceedings for the recovery of land than any one I have found previous to that time. The whole record is to be found in the appendix to Prof. Stearns' Treatise on Real Actions. The form of the verdict in the Superior Court was "a confirmation of the verdict of the former jury" and an appeal was claimed to the King in Council, the appellant recognizing for its prosecution in the sum of £500 sterling.

Another case, determined at the same court, was "John Nelson as assignee of John Watkins and Co. of London. Contra Richard Brooks defendant, in an action of trover or conversion, removed by *Habeas Corpus* into this court from the last Court of Pleas for Suffolk. It is considered by the court that the writ shall abate and that the defendant shall have costs of court £2 3s. 2d."

There is an application on record by John Gifford which, from the manner in which it was made, seems to contemplate an acquaintance with the course of practice in the English Courts. It is addressed to the President and Council in July 1686, and relates to an execution irregularly recovered against him in which he represents that having been reduced in his estate "he begs the favor of Your Honors for this action that he may be admitted to sue in *forma pauperis*."

In regard to crimes, the rules of law do not seem to have been very well defined if one is at liberty to judge from an indictment against John Gould of Topsfield in Aug. 1686, for seditious words spoken by him as Lieuten-

ant of a company of Militia. The words set forth in the indictment were "if the country was of his mind they would keep Salem court with the former Magistrates, and if the country would go the round, he would make the first and go and keep Salem court, and have his company down and do it." Also "that he was under another government and did not know this government." To the indictment are appended the names of the witnesses. A warrant or capias was issued upon it by the Secretary and Gould was arrested, tried and fined.

The court seem to have partaken somewhat of the spirit that prevailed at that time in the English courts, to punish every thing that looked like an impeachment of the government prerogative. It might moreover have yielded to the influence of Randolph who was a fit instrument of tyranny, and towards the old charter as well as any who wished to preserve it, entertained a most remorseless hatred. The whole offence of Lieut. Gould must have consisted in his attachment to the institutions which had grown up under the old charter, and at this day it seems impossible to torture the expression of an opinion in favor of the old court into an indictable offence punishable by fine and imprisonment.

Bills of cost which had been very light under the charter now began to be burdensome,[1] and continued to be more and more so until they became excessively oppressive and extortionate under the President's successor. Indeed the whole movements of the government under Dudley were but a preparatory step to the introduction of that which followed under Andros.

[1] The amount of costs against Gould was £10 1s., among the items of which were the Judge's fee £1, "the Attorney General's fee for pleading on the Indictment," £1 10s. Drawing indictment, 2s. 6d. Filing indictment, 1s. (St. Rec.)

The period of Dudley's administration was short, Andros arriving here with a commission as Governor of New England, on the 19th Dec. 1686, seven months and four days from the time of Dudley's receiving his commission as President.

As most of the persons who took a leading part in the government under Dudley were also prominent men under his successor or subsequent to the revolution, I shall omit a particular notice of them in this place. Of those who were practising Attorneys, however, during this period, I may add that Checkley was a merchant, and will again be noticed hereafter. Thomas was afterwards a Judge of the Superior Court under the new charter, and will be mentioned in that connexion. Watson had been a merchant in London, "but not thriving there, he left the Exchange for Westminster Hall, and in Boston had become as dexterous at splitting of causes as if he had been bred to it. He was full of fancy and knew the quirks of the law: but to do him justice he proved as honest as the best lawyer of them all." Of Masters and Webb I have learned nothing, except that both continued to practice in the courts under Gov. Andros, and the former, especially, appears to have been frequently employed in the management of causes, and died about March in the year 1688.

Bullivant was an apothecary and a physician in Boston, where he was engaged in the same business, many years after the time of which I have been speaking. Dunton in his "life and errors" from which I have already quoted, in describing Bullivant says "his knowledge of the laws fitted him for the office of Attorney General. And while he held his place he was so far from pushing things to that extremity, as some hot spirits would have had him, that he was for accommodating things and making peace. His eloquence is admirable. He never speaks but it is a sen-

tence, and no man ever clothed his thoughts in better words." (2d Ser. Hist. Col. 2d vol.)

He was a distinguished wit withal, and notwithstanding his being an Episcopalian, seems to have been popular in his day, although he became one of the associates of Andros. He practised medicine as well as compounded it, and with great success, and thus combined the many qualities of a witty apothecary, a medical lawyer, and an honest politician. When Andros was imprisoned, Bullivant was also arrested and sent to the castle, but he addressed the Council of safety, telling them he knew of no cause for imprisoning him, and was admitted to bail. He was in business as an apothecary and physician as late as 1699 after which we lose sight of his history. (2 Hutch. 107. n.) Among the anecdotes that are preserved of his ready wit, is one which is given as illustrating the character of the parties concerned. Lord Bellamont, while Governor, took great pains to ingratiate himself with the people, and although an Episcopalian, always attended the weekly lecture in Boston. On one of these occasions, Bullivant was standing in his shop door as the Governor was returning surrounded by a great crowd. The Governor addressing himself to Bullivant said, "You have lost a precious sermon to-day Doctor!" The latter whispered to one near him, "If I could have got as much by being there as his Lordship will, I would have been there too."

CHAPTER VI.

The Colony during the Administration of Governor Andros.

Sir Edmund Andros arrived at Boston in the King Fisher Frigate, on the 19th Dec. 1686. His commission as Governor, embraced the whole of New England, and thus, for the first time, Plymouth and Massachusetts became united. Two years after that, he received a new commission embracing New York also in his government.

A large number of persons, thirty-nine in the whole, were commissioned with him to act as his Council, five of whom might form a quorum. And to the Governor and Council was delegated full powers of making, interpreting and executing the laws, subject to revision by the crown. His commission was published on the 20th December, and on the same day he issued an order continuing all officers then in power in their several places, until further orders should be given.[1]

His commission constituted the Governor and Council a court of record, with full power to hold pleas, civil and criminal, and both real and personal, and gave them author-

[1] The first council meeting was held Dec. 30, 1686, at which seventeen were present, eleven of whom took the oaths of allegiance and of office by *standing up* and *holding up their hands*. Two of the number were permitted to make affirmation under the penalties of perjury instead of taking an oath in the usual form. (2d Ser. Hist. Col. viii. 182.)

ity to establish such tribunals of justice as they should deem necessary.[1]

On his first arrival he directed the Judges to administer justice according to the customs of the places in which their courts were held, and began with high professions of regard for the public good.

He assumed to be the Supreme Ordinary, and though it became extremely oppressive for all persons having any business of this kind, to come to Boston as by his orders they were compelled to do, and although the fees to be paid by the parties were greatly increased, yet it ought to be acknowledged that he did much to introduce a regular system of forms in the proceedings in Probate Courts, which before that had been loose and uncertain. He personally attended to the administration of estates exceeding £50, and the ordinary fee for the probate of a will was 50s.

The people were the more easily reconciled to the change in their government although they were deprived of any share in it, on account of being relieved from the dread they had felt of having the bloody Col. Kirk, as their Governor,[2] and seem to have submitted to being deprived of their House of Deputies and to the appointment of Andros with no great reluctance. Indeed, there was no want of capacity on the part of their Governor to administer the government, and his professions on entering upon its duties were flattering to their hopes.

Of his administration of the political and fiscal affairs of the colony it is not proposed to speak any farther than

[1] The Commission of Gov. Andros may be found in the 7th Vol. of the 3d Series of Mass. Hist. Col. 139, but is too long to insert here.

[2] Kirk had actually been commissioned as Governor and was about sailing when the death of Charles interposed and saved the Colonies from the control of a man "than whom it would not be easy in the whole records of human cruelty and wickedness to point out a man who has excited to a greater degree the abhorrence and indignation of his fellow creatures." (1 Graham His. 429.)

they were connected with the judicial institutions of the day, and I shall therefore confine myself to the few relics that are left of the several courts, and gather from these as well as may be the records of the system of administering justice which he adopted. Almost the entire records of the period during which Andros was Governor, were sent by him to England and have never been regained.[1]

No important change seems to have been made in the courts for several months after his arrival. He was slow in unmasking himself, till he had so far put the public apprehensions at rest, and had so managed with his council that he had acquired all but absolute power. He knew his men and never was a man more fortunate in finding congenial spirits to associate with, than he. Randolph was a willing and never-tiring tool of a tyrant. West was little better than a harpy in his office, and the little cabal whom Andros had art enough to separate from his council as his confidential advisers, served only to keep him and each other in countenance in the inroads which were being made upon the liberties of the people.

On the 3d of March 1687, "an act for the establishing Courts of Judicature and Public Justice" was passed "by the Governor, by and with the advice and consent of the Council." And although the administration of justice was wholly perverted under the application of this system, it will be obvious to any one, that, as a system, if proper Judges could have been commissioned, it was a decided improvement upon that adopted under the charter. It, in fact, furnished the outline of the system which was afterwards established under the second charter.

[1] Much light has been thrown upon this period by the labors of Mr. Felt who has collected and arranged in volumes the scattered papers which had lain in an almost inaccessible condition in the department of the Secretary, and has thus brought to view many valuable documents whose existence was scarcely known.

In all trials, as well in matters of admiralty as others, and before Justices of the Peace as well as the higher tribunals, either party desiring it, might have a jury to pass upon his case, he paying the expense of summoning them into court. No person could be a juror who had not real or personal estate of the value of 50 marks. And writs were to issue from the clerk's office of the several courts under the seal of the court, and in the King's name.

Justices of the Peace had civil jurisdiction in all matters of debt, trespass, &c. where the claim did not involve the title to lands, nor exceed forty shillings in amount, and Justices were bound to keep a regular record of their proceedings.

The next court in rank was that of the "*Quarterly Sessions*," held by the several Justices in their respective counties, and was charged with the conservation of the peace and the punishment of offenders.

An "*Inferior Court of Common Pleas*" was to be holden in each county "by a Judge assisted with two or more of the Justices of the County." Their jurisdiction extended to all civil causes not exceeding ten pounds, in controversy, wherein no question of freehold was involved. This limitation however was extended in the town of Boston to 20 pounds, and the court sat there once in two months, instead of annually as in the other counties. The reason given for this was that Boston was "the chief seat of trade within this dominion."

The "*Superior Court of Judicature*" had jurisdiction over all civil and criminal matters in the colony, either original or by appeal. No action could be commenced in this court for the recovery of less than ten pounds, unless a question of freehold was involved in the suit.

The extent of jurisdiction of this court expressly embraced that of the King's Bench, Common Pleas and Ex-

chequer united, as they were exercised in England. English laws, so far as was consistent with the state of the country, were made the guide of the courts, and the times and places of holding the Superior Court were prescribed in the act. [1]

Besides these, there was a *Court of Chancery* created with as full and ample powers in all matters of equity as those of the High Court of Chancery in England. It was to be holden by the Governor or by such person as he should appoint Chancellor, to be assisted by five or more of the council, and this court was to sit from time to time as the Governor might appoint.

These were the several courts established by formal acts of the Governor and Council, but there were from time to time special courts of Oyer and Terminer created for the trial of offenders, consisting of a larger or smaller number, according to the circumstances of the case, three at least being requisite to form a quorum and one of these was always to be one of the Standing Judges of the Superior Court. In addition to these, "*Commissioners of Small Causes*" were continued as under the charter. Appeals lay from the Quarter Sessions and the Courts of Common Pleas to the Superior Court in case of error, and causes were removed to the latter court by writs of Error.

So in cases of error in the Superior Court, appeals lay to the Governor and Council, if the "value appealed for" exceeded £100 sterling.

From the Governor and Council, as well as from the Court of Chancery, appeals lay to the King in Council, if the matter exceeded £300 sterling.

To prevent the accumulation of costs, no Inferior Court

[1] These places were Boston, Cambridge, Charlestown, Plymouth, Bristol, Newport, Salem, Ipswich, Portsmouth, Falmouth, Northampton and Springfield.

was permitted to sit more than three days at a term, and in the language of the act "that no man be damnified by the mistake of his lawyer for matters of form," it was directed that no judgment should be arrested for mere matters of form, and the courts had full authority to grant amendments.

The courts, moreover, were vested with full power of making and establishing rules and orders for the regulation of their own proceedings.

This is an outline of the system established by Gov. Andros and his Council, and I infer from the few records that are extant that it soon went into operation. Forms of commissions were prescribed for Judges of the Court of Common Pleas, Justices of the Peace, Clerks and Notaries Public, and Commissions issued, I believe for the first time in Massachusetts, to "*Sheriffs*" under that name. A table of court fees was established during this period, but seems to have answered very little purpose in guarding the people from extortion.[1] The number of practising Attorneys increased and the office of Attorney General became an established one.

Among the changes introduced by Andros was that in the form of administering oaths. It was now required to be "by the Book," and such as scrupled to do this were

[1] The court fees established were as follows, viz: For Commissioners of small causes, attachment or summons, 1s. Subpœna for witnesses, 3d. Entry, 3s. 4d. Filing papers each paper, 2d. Judgment, 6d. Confessing Judgment, 1s. Execution, 2s. Marshal's fees on every verdict, 1s.

Sessions Fees. Each Justice per diem paid out of the fines. 5s. In civil actions, Entry, 5s. Jury on verdict not less than 6s. 6d. Entering and approving Bonds, 2s. All other fees as above.

Superior Court. Jury, verdict not less than 6s. 6d. Entry of action, 10s. Confessing Judgment, 2s. Additional entry fee if over £20, 10s. Entry of Judgment, 2s. Marshal's fee in every verdict, 1s.

Governor and Council. Entry of Appeals, 2s. 6d. Entry of actions, £1. (St. Rec.)

fined and imprisoned.[1] (1 Hutch. 320.) And yet with the capricious inconsistency of a tyrant who has a purpose to answer by violating his own laws, in an action brought by Randolph against Increase Mather, which will be mentioned hereafter, a witness on the part of the plaintiff having declined "swearing upon the Bible," was permitted to take the oath by holding up the hand. (St. Rec.)

It would exceed our limits to trace, if I were able, the several steps taken by Andros to rivet his own power and supplant the liberties of the people. Among these however was his concentrating all legislative, judicial and executive authority in himself and a few supple and subservient tools whom he adopted as his confidants. All others were, in effect, excluded from any participation in the government. Thus in June 1688, the king having created the office of "Provost General" of New England, granted it by letters Patent to Sir William Phipps, who took the oaths of office, and called upon Andros to dismiss the Sheriffs he had commissioned, and requested that writs thereafter might be directed to the Provost Marshal or his Deputy, instead of the Sheriffs, as the Governor had ordered them to be done. This requisition however was evaded, and as stated by Graham, (i. 446) "the Governor and his creatures incensed at this interference made an attempt to have him assassinated and soon compelled him to quit the province and take shelter in England."

Andros, at last, found himself in possession of absolute power, and began to exercise it with an unsparing hand. Upon mere suspicion of opposition to his measures, or, at

[1] Judge Sewall states that four men were fined and imprisoned in one day for refusing to lay their hands upon the Bible to swear. (Journal.)

most, for the mere uttering of words indicating such opposition, some of the most respectable and leading men in the Province were arrested by the Secretary's warrant, brought from remote counties, and thrown into prison in Boston and elsewhere, and there detained, in some instances, more than a year, without trial and even without a previous examination or indictment. And applications in the most humble terms for even a trial, were wholly disregarded.

Dudley Bradstreet of Andover, son of the late Governor, and who was himself named as one of Dudley's council, was arrested and thrown into prison in Boston by virtue of a warrant from the Governor directed to the Messenger of the Council. The ground of his commitment is recited in the warrant to be "forasmuch as I have received information that he is a person factiously and seditiously inclined, and disaffected to his Majesty's government, and one who hath endeavored to alienate the hearts of his majesty's subjects from the same."

Similar warrants were issued against Samuel Appleton, Nathaniel Saltonstal and others who were leading men in their several towns. And such was the state of abject submission to which they were reduced, that after a long period of confinement, Dudley Bradstreet, as well as the others, petitioned the Governor, in most humble terms, for the *privilege* of being tried, and this being refused, he supplicated for his discharge from imprisonment, as an act of *grace* on the part of the Governor. [1]

The same month that Mr. Bradstreet was arrested, September 1687, an information was filed by one Philip Nelson against the Rev. Samuel Phillips of Rowley, for

[1] John Nowell and Thomas Witt petitioned the Governor for a trial in 1680, "having been imprisoned a year and nothing having been offered against them."

adopted, the motto of which was "ne unquam Libertas gratior extat." (Chalm. 463.)

Under an administration that grew worse every day, it would sound like a solecism to speak of any improvement in the practice of the law. But so far as *forms* went, the system was decidedly improved, although the spirit of Justice was banished from the courts that bore her name.

The number of practising Attorneys increased, but the state of the legal profession must have been very low. Bullivant, Checkley, Webb, and Masters were still in practice, and the names of Thomas Newton,[1] King,[2] Hayman,[3] Farwell, John West, Graham and perhaps others may be found as Attorneys in the Courts during the time of which I am speaking.

The character of the profession may be inferred from an extract of a letter written by Randolph to Mr. Povey in January 1687-8. "I have wrote you of the want we have of two or three honest Attorneys (if any such thing in nature.) We have but two, one is West's creature, come with him from New York, and drives all before him. He also takes extravagant fees, and for want of more, the country cannot avoid coming to him, so that we had better be quite without them than not to have more."

The one here referred to as West's creature I suppose was Farwell, but do not know who of the practitioners

[1] Thomas Newton is mentioned in 1713-14 as a church warden of the Boston Church of England. 1 M. Hist. Col. 217. He is spoken of in Judge Sewall's Journal. "1688 June 8, Mr. Dudley and Stoughton call here. In comes Mr. West, and hath one Mr. Newton a new comer sworn an Attorney." He was sworn upon the Bible by Mr. Dudley. He was afterwards Attorney General and will be further noticed in this work.

[2] King we believe was a Bookseller in Boston, and is probably the one mentioned by Dunton in his Life and Errors. 2 Hist. Coll.

[3] Hayman was probably the same who under the new charter was a Judge of C. C. P. in Middlesex.

at the bar was the other Attorney referred to by Randolph, as Graham seems not to have removed to Massachusetts so early as the date of this letter.

I cannot, perhaps, give a better idea of the practice in the courts and of the mode of administering Justice under Andros, than by copying, somewhat at length, from the Court records the proceedings which were had in some of the cases whose records are still preserved. I may remark, by the way, that the number of actions that stood upon the docket of the Suffolk Court during this period varied from eight to fourteen, of which a good proportion were informations or actions to recover penalties for selling rum, &c. In October 1687, four of the eight actions were of this character, and February 1688, three of the nine were penal actions, and the other six were actions of *debt*.

The first case that will be noticed was one which was tried at a Special Court of Oyer and Terminer in 1687. It may be found in the Records at the Secretary's office, and is also given in the History of Ipswich by that faithful and accurate Antiquary, the Rev. J. B. Felt. Andros had begun to exercise the right of levying and assessing taxes upon the several towns under a mere order of the Council. The people having always regarded this as proper to be done by their own representatives only, were unwilling to yield to the arbitrary impositions of the Governor and his parasites. Among other towns which were ordered to raise money for the government, was Ipswich, over which the Rev. Mr. Wise was settled as minister. A town meeting was called to act upon this requisition, and as they doubted the authority of the Governor and Council to raise money in that way, they declined making the grant. Whereupon, Mr. Wise and five others of the principal inhabitants of the town were arrested. In their

own words "we were brought to answer for said vote out of our own county, thirty or forty miles into Suffolk, and in Boston kept in Jail for 'contempts and high misdemeanor' as our mittimus specifies, and, upon demand, denied the privilege of Habeas Corpus, and from prison overruled to answer at a Court of Oyer and Terminer in Boston. Our Judges were Joseph Dudley of Roxbury, Stoughton of Dorchester, John Usher of Boston and Edward Randolph. He that officiates as Clerk and Attorney in the case is George Farwell. The jurors only twelve, and most of them, as is said, non-freeholders of any land in the colony, some of them strangers and foreigners, gathered up as we suppose to serve the present turn. In our defence was pleaded the repeal of the law of assessment upon the place. Also the Magna Charta of England and the statute laws that secure the subjects' properties and estate, &c. To which was replied by one of the Judges, the rest by silence assenting, that we must not think the laws of England follow us to the ends of the earth or whither we went. And the same person declared in open Council upon examination of said Wise, 'Mr. Wise you have no more privileges left you than not to be sold as slaves,' and no man in council contradicted. By such laws our trial and trouble began and ended. Mr. Dudley aforesaid, Chief Judge, to close up the debate and trial, trims up a speech that pleased himself (as we suppose) more than the people. Among other remarkable passages to this purpose he bespeaks the Jury's obedience who we suppose were very well preinclined, viz. 'I am glad' says he 'there be so many worthy gentlemen of the Jury so capable to do the King's service, and we expect a good verdict from you, seeing the matter hath been so sufficiently proved against the criminals.'

"Note! The evidence in the case as to the substance

of it was that we too boldly endeavored to persuade ourselves we were Englishmen, and under privileges, and that we were all six of us aforesaid at the town meeting of Ipswich aforesaid, and, as the witness supposed, we assented to the aforesaid vote, and also that John Wise made a speech at the same time, and said we had a good God and a good King, and should do well to stand to our privileges. The Jury returned us all six guilty, being all involved in the same information. We were remanded from verdict to prison and there kept one and twenty days for judgment. Then, with Dudley's approbation, as Judge Stoughton said, this sentence was passed, viz., John Wise suspended from the ministerial function, fine £50, pay cost, £1000 Bond. John Appleton not to bear office, fine £50, pay cost, £1000 Bond. John Andrews not to bear office, fine £30, pay cost, £500 Bond, (and similar sentences were passed upon the others.) These bonds were for good behavior for one year."

The whole expenses and charges thus incurred by the six, exceeded £400, besides which they suffered a long and most irksome imprisonment under which their spirits sunk and their fortitude forsook them.

A trial, somewhat famous in its day, between Randolph and the Rev. Increase Mather may serve to show the practice of the courts during this period. It appears to have been the custom not to file the declarations until the actions were entered in court, and that may in some measure account for the entire vagueness and insufficiency of the allegations and averments in many of the writs on file. The present action was for slander, and grew out of Mr. Mather's having charged Randolph with forging a letter which had been sent to England, purporting to have been written by Mather, and calculated to prejudice him in the minds of the King and Ministry. The damages

were laid at £500.[1] "Checkley and Masters for defendant plead not guilty. Hayman for plaintiff opened and declared. Farwell for plaintiff pursued and read the letter. The letter was admitted to be wrote by defendant to the President (that is, the one in which the charge of forging the other letter was made,) but he says he never published the same to any. To prove the publication of the letter, Mr. Farwell produces John Hale of Beverly and Giles Masters. Hale objects against swearing on the Bible and was admitted to swear by holding up the hand."[2] The whole of the witnesses' testimony is entered upon the record. Masters acknowledged that he had the letter before the bringing of the action, and then both Hayman and Farwell were sworn and testified in the case. Randolph, as might have been expected, could not find a Jury who would render a verdict in his favor, and, accordingly, failed in his suit. This however was rather from the universal odium in which he was held, than from any particular purity or independence of Juries at that time.

The following case will illustrate the mode adopted to manage Juries when any of them proved refractory and declined yielding their own opinions to the dictation of the Bench.

The case was Broadbent vs. Woodcock, tried September 1688. It was to recover a penalty for selling beer. The trial was had and the Jury retired and were out all night without agreeing. And before they agreed the Session of the Court terminated, and it was adjourned with-

[1] The bail for Mr. Mather, as stated by J. Sewall were Maj. Richards and Mr. Tyrrel.

[2] Judge Sewall has this entry in his Journal under January 31, 1687-8. "Mr. Randolph in his action against Mr. Mather is cast. Mr. Hale being subpœnaed by Mr. Randolph, pleaded he might not lay his hand on the Bible—must swear by his Creator, not creature. It was granted that he only lift up his hand as customary in New England."

out day. After this the Jury agreed, and the verdict being signed by the foreman was handed in by him at the next term of the Court, no other Juror attending. The Jury found defendant guilty of selling two pots of beer for which he received two pence, and they returned a verdict against him for two pence costs of suit. Whereupon Checkley, counsel for defendant, moved in arrest of judgment for the reasons, substantially, above stated. And upon this motion judgment was arrested.

It appeared that while the Jury were out, Graham, the Attorney General, went to them several times to ask them if they were agreed, and was told by them that all but one had agreed. The next morning he went to the Jury again, and took the juror who would not agree, out of the room, and talked with him, telling him what he ought to do. The juror insisted that it was for the Jury to judge of the validity of evidence. The eleven had in the mean time been supplied with food and drink, but the refractory juror, was not permitted to partake of it. The juror still insisted that he could not convict the defendant upon the evidence before them. The Attorney General then told him it was better for eleven men to destroy one man, than for one man to destroy eleven. Whereupon the juror, whose name was Edward Gouge, said, rather than destroy the eleven he would agree. And the verdict thus made up, was returned and recorded as above stated. The management with the Jury by one of the counsel did not however, form any part of the ground upon which the judgment was arrested.

One other case in which I shall suffer the party to tell his own story, as it was carried through several courts, will suffice to show the extent to which bad Judges, and bad courts may become the means of prostituting justice, and oppressing the people.

This was the case of Broadbent vs. William Colman for an alleged violation of the excise law, tried before West, who acted as Judge of the Court of Sessions.

"There was a profligate fellow, one John Weadon received of Joshua Broadbent five shillings, to swear that I sold him a gallon of rum, the which the said Weadon did, before Justice Bullivant, and that it was on the 15th June, 1687, that I sold it him. At the petty Sessions, said Weadon swore it was on the 18th. This same case was traversed to the Inferior Court of Pleas, and there the said Weadon did appear and swore that the said gallon of rum was sold on the 19th July. I prayed Mr. West who was then Judge of the Court, to ask said Weadon whether ever he bought any rum of me above once, the which said West did, and then said Weadon replied, never but once in his life. But for all the plea I could make, this one witness plainly appearing a foresworn person, the packed Jury received the charge from the Judge, brought me indebted to the King £5, and Justice Bullivant sent for me a few days after and demanded £8 1 shilling, refusing to give me a bill of costs. I was forced to pay him £5 and £3 1 shilling costs, or else Execution must have come against me. On the 24th October, I paid said Bullivant the sum of £8 1 shilling, which as I remember was on Saturday, and on Monday after, Larkin arrested me for £20 more that I should be indebted to the King. I was forced to give bail, but could not procure a copy of the writ. I went to the Sheriff but he refused to give me a copy. I searched all the offices for the original writ, but none to be found. The Court came, and when the case was called, then a declaration appeared against me. No time would be granted me for to answer the declaration, but I must then answer guilty or not guilty. I made my exception against sundry of the jurors, but all in vain.

They went on to trial. I had two Attorneys, Masters and King, but Judge West so handled the matter in giving the charge to the Jury that they brought me in debt to the King £16 0s. 6d. I made my address to Sir Edmund Andros and gave him an account of my hard usage, but to little purpose. I was advised to carry the case to the Superiór Court. I did so and Masters and West had £8 12s of me to bring it there, and that morning the Court came, Masters had 48 shillings of me and told me it was to enter the action, and make up the record. But when it came to be pleaded, Judge Dudley—that good man—would admit of no plea, but said it was the King's business and so confirmed the former Judgment. Immediately then came Farwell upon me for costs as the King's counsel, for so he termed himself, and demanded of me £8 12s. My bill of costs that he sent me, was in Latin. What it was I cannot tell, and the bill of costs was signed by Judge Palmer, and yet he was not in the country when the cause was tried. Then comes Thomas Dudley and he demanded of me 28 shillings, the which he called his fees, but would give me no account what it was for, I was forced to pay it. The whole which hath been so injuriously forced from me, amounts to the sum of £45 1s. 6d.

Sworn, January 23, 1689-90."

Poor William Colman was not the first man who has had the sad experience of going to law to his cost, and if he fared worse than others have done in more modern times, it was because he fell into the hands of a knave for a judge and a couple of pettifogging attorneys for counsel who, of all harpies of the law, have ever been found the most greedy and insatiable.

It would seem as if a course of measures such as have been alluded to, would of itself, be enough to drive a people to desperation. But this was but a part of the system

of oppression and injustice under which the people of New England suffered while Andros remained in power. The administration of justice did not necessarily affect every individual personally and at once, but when it was announced that all landholders must take out new patents for their lands, and that their former titles however acquired, were regarded as void, a more general alarm was excited through the province. The records extant show a vast number of petitions from individuals for confirmation of their lands, while others, especially the favorites of the Governor, petitioned that valuable and ancient estates might be assigned to them at the expense of their lawful owners.

A conversation with Mr. Higginson of Salem has been preserved relative to the title of the lands in the Province in which the Governor claimed that they all belonged to the king, while Higginson insisted that they had been acquired by fair purchase from the natives. The only reply was, "you are either subjects or you are rebels." In another instance, the Committee of Lynn resisted the application of Randolph to have the peninsula of Nahant given him, on the ground of a former purchase and occupation by the town. The Governor told them that they could have no true title until they could prove a patent from the king, neither had any person a right to one foot of land in New England by virtue of purchase or possession or grant of court, and if they would have assurance of their lands they must go to the king for it and get a patent of it. He further refused them permission to have a town meeting, as all town meetings had been prohibited by law, except one for the purpose of choosing officers for the year, and told them that their ancient records by which they vindicated their title to their lands, were not worth a rush. (Lewis' Lynn, 138.)

Forbidden to hold their accustomed meetings, mocked with injustice whenever they sought redress in the courts, threatened to be stripped of their possessions without trial and without pretence of right, and subject at any hour to be seized, under the Governor's or Secretary's warrant upon the false or frivolous charge of some vile informer, or the cowardly suspicions of the tyrants who held rule over them, the people were at length driven to desperation, and a rumor having reached Boston that the Prince of Orange had landed in England, they rose by a spontaneous movement, and seized the Governor and several of his advisers and threw them into prison. This revolution took place on the 18th April 1689, and the old Magistrates, with the former Governor, Bradstreet, at their head, together with some of the most influential men in the Province, assumed the government under the name of "a council of safety."

Andros at the time of the rising of the people, fled to the fort on Fort Hill; and was taken from thence to the House of Mr. Usher, where he was detained under guard for several hours. He was there bound with chords and led back to the fort, and transferred from thence to the castle. In August he contrived to escape and had reached Newport, when he was arrested and sent back to prison. In February 1690, he was sent home to England by order of the king, and from that time ceased to have any connexion with New England. Before coming to this government he had been Governor of New York, and in 1692, after his return to England, was appointed Governor of Maryland and Virginia. In this office he is said to have been acceptable to the people and far from being a bad ruler. He probably learned experience from New England, and never was wanting in capacity to do well, if his inclination had not been perverse.

It may, however, be difficult to know what his course

of policy might have been in New England, if he had been placed under different auspices. He was the viceroy of a contemptible tyrant, and his counsellors and advisers were the willing panders of a wicked master. Whatever he might have been under different circumstances, as he was, he will ever be remembered as an odious, grasping and cruel despot. He was removed from the office of Governor of Virginia in 1698, and returned to London, where he died at an advanced age, in 1714.

I cannot close these remarks upon this period of these sketches without noticing at greater length some of the principal men who have been named in them.

As Stoughton seems to have been a sort of "Vicar of Bray" politician, whereby, "whoever the King might be," he contrived to be in office, I shall have occasion to notice him more at length in connexion with the courts of which he was a member under the new charter.

Joseph Dudley was the son of Thomas Dudley, governor of the Massachusetts colony, and was born July 23, 1647, when his father was seventy years of age. His mother afterwards married the Rev. Mr. Allen, of Dedham, under whose care he passed the early years of his life, till his admission into college. He was graduated at Harvard in 1665, and was educated for the ministry. His ambitious views rendered him unwilling to devote himself to the duties of that profession, and he accordingly abandoned it for a public life. He was a representative in the general court from Roxbury, from 1673 till 1675. The following year he was chosen an assistant, and continued to be re-elected to that board till 1685. In 1681 he was chosen, with Mr. Richards, agent of the colony. The colony charter was in danger of being lost through the machinations of Randolph, and a last effort was made to preserve it by a direct appeal to the crown. The polit-

ical parties in the colony, however, were divided in regard to the policy which ought to be pursued, in view of this threatened loss, and not a few, among whom was the celebrated Elisha Cooke, were opposed to taking any measures which could be construed into a surrender to the king of a right to control the charter at all, unless the same had been violated. Dudley belonged to the opposite or prerogative party. The agency proved unsuccessful, and the charter was vacated against law, and without even, scarcely, the forms of justice.

The embassy to England was not however lost to Dudley. He ingratiated himself with Randolph, and was successful enough to procure a commission as president of Massachusetts and New Hampshire. He had in the mean time so far lost his popularity in the colony, that he was left out of the board of assistants at the election of 1686. Soon after, however, he received his commission as president, and entered upon the duties of the office. A council was named to aid him in the government, but the house of representatives was dispensed with.

He organized the courts of the colony anew, and, among other improvements, introduced one regulating the admission of attorneys, and requiring an oath of office to be taken by them upon their admission to the bar. This oath was adopted in July, 1686, and was in most respects substantially like the one required by the law of 1701, which has been used ever since that time.

The term of his office soon expired by the arrival of sir Edmund Andros, in December, 1686, with a commission as governor of all New England, so that Dudley had only held the place of president a little over seven months. He was placed at the head of Andros' council by commission from the king, and seems to have been too much in his confidence to escape the odium with which that mis-

erable tyrant was regarded by the people of Massachusetts.

No change was made in the courts until March, 1687, when a superior court was established, consisting of three judges, and Dudley was placed at the head of the court. He held this place for about a year, when he was superseded by the appointment of chief justice Palmer, and accepted a subordinate place on the bench. It was while he was at the head of the court, that the famous trial of the Rev. Mr. Wise, of Ipswich, was had, a report of which has already been given.

After a tedious and harrassing delay, the prisoners were put upon their trial. They claimed the privileges secured to them as Englishmen by the magna charta and the laws of England. The chief justice, however, informed them, that they must not expect that the laws of England would follow them to the ends of the earth, and concluded by telling them, that they had no more privileges left them than not to be sold as slaves. He charged the jury, and stated that the court "expected a good verdict from them, seeing the matter had been so sufficiently proved against the criminals." A verdict was accordingly rendered against them, and a severe punishment thereupon inflicted, because the town in which they resided declined yielding to an arbitrary and illegal act.

This anecdote may serve to illustrate the state of the administration of justice at that time, in Massachusetts, as well as the judicial character of judge Dudley. Nor was this a solitary case of the grossest prostitution of the forms of justice, to purposes of party vengeance and sordid self-interest, which was practised while he was upon the bench.

Dudley continued upon the bench until the revolution of 1689. At the time that broke out, he was holding a

court in the Narraganset country. Upon hearing what had taken place in Boston, some of the people of Providence went and arrested him, and brought him back to his house in Roxbury, where he was placed under a guard of soldiers. From thence he was carried to Boston, and after being imprisoned awhile at the house of Mr. Eyre, one of the council of safety, he was confined in the castle and underwent a long and rigorous imprisonment. He complained of being destitute of necessary food and fire, and there is little doubt that he suffered under the severity to which he was subjected.

He was sent with Andros to England to answer to the complaints of the colony, but these were never prosecuted, and he seems not to have suffered much loss of royal favor, for, the following year, he was appointed chief justice of New York, and held that office about three years. He found that province in a state of great party excitement, and his conduct in the trial of Leisler, the head of one of the factions, gave great offence to his political opponents, and was the ground of serious charges against him in England.

He does not appear to have been satisfied with the office he held: for, in 1693, he was again in England, endeavoring to supplant governor Phipps, but having failed in this attempt, he was made lieutenant governor of the isle of Wight, through the influence of lord Cutts, the governor of that island, and held the office eight years. While resident there, he was elected and served as a member of parliament for Newton in the county of Southampton, but with what degree of success, does not very satisfactorily appear. With all his honors and emoluments, however, he was discontented while away from New England, and spared no opportunity for recovering the favor he had lost with the people there. He courted the

dissenters, made peace with Mr. Mather, and succeeded so well in his endeavors to remove the prejudices existing against him, that, on the death of lord Bellamont, he obtained the office of governorof Massachusetts and New Hampshire. He returned to Boston with his commission, June, 1702, and was well received by the people. He however remembered those, through whose agency he had suffered at the time of the revolution, and spared no opportunity of manifesting his feelings of hostility towards them. Several of those who had been members of the council for many years were again elected, but were rejected by him on coming into office. Among these was Mr. Cooke, who was among the most popular men in the province, and connected with many of its most influential families. This involved him in disputes, and his lofty bearing as chief magistrate also gave offence to many. Charges of a scandalous nature were preferred against him to the queen, but did not find credence in England, nor were they generally believed even in Massachusetts.

Besides the wars with the Indians, the administration of governor Dudley was distinguished by two military expeditions, one in 1710, which resulted in the reduction of Port Royal, and the "Canada expedition" of 1711, which was little better than a series of disasters from the beginning to the end. Among the consequences which resulted from the latter expedition, was a heavy province debt, and a resort to bills of credit as a means of defraying the expenses thereby incurred. Out of these arose two parties which long divided the province; one contending for the establishment of a private bank, the other for a loan of the public faith, in the form of bills of credit. The latter project prevailed, and of the two it had the preference in the mind of the governor, who thereby enlisted a bitter and powerful opposition to all his measures.

The governor's commission expiring upon the death of the queen, he was supplanted by colonel Burgess, who was commissioned on the 17th March, 1715. Burgess, however, never came to New England, and was succeeded by colonel Shute. Governor Dudley retired from the office in November, 1715, and the place was filled by the lieutenant governor till the arrival of governor Shute, in October, 1716. Governor Dudley was at this time nearly seventy years of age, and had begun to feel the cares of government as a heavy burden; and upon his leaving the chair of state, he retired to his seat in Roxbury, where he died April 2, 1720, at the age of 73 years. On the 8th of the month he was buried with great pomp and respect. Two regiments of infantry and two companies of cavalry took part in his funeral; minute guns were fired from the castle and all the bells in Boston were tolled. The council attended, and an immense concourse of the most influential men in the province were present on the occasion.

No native of New England had passed through so many scenes and enjoyed so many public honors and offices as governor Dudley.

Had he remained in private life, he would have been justly eminent as a philosopher and a scholar, a divine or a lawyer. He was, in fact, to no small extent, all these, even amidst the cares and perplexities of public life.

In private life, he was amiable, affable and polite, elegant in his manners, and courteous and gentlemanly in his intercourse with all classes. His person was large, and his countenance open, dignified and intelligent. He had been familiar with the court, and his address and conversation were uncommonly graceful and pleasing. As a judge he was distinguished for gravity, dignity, and on ordinary occasions, mildness of manner. As a chief mag-

istrate, none could doubt his capacity to govern, and the prudence with which he managed the affairs of the province, disarmed even the opposition of his enemies.

Ambition was his ruling passion, and the desire to be the governor of his own native province, seems to have outweighed every other consideration of profit or advancement. In accomplishing his ends, he regarded means as of a secondary consideration. While pursuing his career of ambition, he encountered enemies the most determined, and at the same time was able to win and draw around him ardent and devoted friends, who never deserted him. He ran through the scale of honors and political preferments in the colony, and retired at last wearied and worn out with the perplexities and responsibilities of office, to enjoy a few years of quiet and reflection in the scenes of domestic life. He was justly regarded as an honor to Massachusetts, and though his character and opinions as a judge probably added little weight to the judiciary of the province, it seemed due to his eminent station in public life, to trace thus briefly his political character, although these sketches are chiefly designed to preserve the names of those who have been distinguished by their connection with our courts.

Governor Dudley was connected by birth or marriage with many of the principal families in the province. His son Paul was afterwards the able and distinguished chief justice of the province, and another of his sons was for many years speaker of the house of representatives. His descendants are still among us, but the name has yielded to the republican tendency of our institutions, and is not now to be found among those in place and power in our commonwealth.

Peter Bulkley, was one of the associate Judges of the Superior Court, while Dudley was Chief Justice. He was

the son of the distinguished Minister of Concord of the same name. He was born August 12, 1643, and was graduated at Cambridge in 1660. He was educated for the ministry, but afterwards took a leading part in the affairs of the colony. He was a representative from 1673 to 76 and, the last year, was Speaker of the House. He was sent, the same year, to England as agent to answer the complaints of the heirs of Mason and Gorges. He was an Assistant from 1677 to 1684 and was named of Dudley's council. He also held several military commissions such as Captain, Major, &c. If the character given of Bulkley as a judge, by Randolph, be correct, he made but an indifferent figure in that office. "I have wrote," says he in a letter to Mr. Povey, "to Blaithwait the great necessity of Judges from England. I know there are some loyal gentlemen and able lawyers who have not practice. The Judges with us being now three, have three hundred and ninety pounds a year between them all, besides their fees which they make very considerable to them. Now two will serve our occasions. They ought to be of the council, and their salaries made up four hundred pounds a year apiece—they will deserve it. As for Bulkley he is stupified and drowned with melancholy and almost useless, being very seldom with us."

He died in May 1688, in his 45th year, at Concord, "having languished a long time."

Each of the three Judges already named, had been educated clergyman, and were ignorant of the rules of evidence as well as the forms of practice, if we may judge from the records that remain of their proceedings.

Dudley was superceded as Chief Justice by JOHN PALMER, who went to England and returned in 1688, with a commission from the king for that place, while Dudley

consented to take a subordinate station upon the same bench.

I have never been able to trace his history but infer from letters written by him about this time, that he had been a Judge of Admiralty in New York while Andros was Governor of that province. He was in New England as early as July 1686, relative to some breach of the revenue laws, and then styles himself "one of the Council and Judge of the Admiralty in his Majesty's Plantation of New York." He was one of Andros' Council for New York, and early became one of his confidants, and as he is called by a writer of that day, "one of the Governor's tools." (Rev. in N. E. justified.) He was the organ of the government in preparing an answer to a declaration published by the inhabitants of Boston in 1689, upon the subject of the difficulties with the Governor, and, the same year, attended Andros with Graham the Attorney General, in his tour to Pemaquid. He was one of the persons imprisoned with the Governor at the revolution, and was refused permission to be bailed. (1 Hutch. 345, n.) I find among the records at the Secretary's office, a letter from the wife of Judge Palmer to the Deputies, dated Oct. 5, 1689, praying that he might be released from prison at the castle, as he was suffering from the gout, and the room in which he was confined had no chimney, and consequently he could have no fire. She requested that he might be removed to his house in Boston. The Deputies, however, refused her application, but directed a chimney to be erected in his room. In a few days he was transferred to the jail in Boston, and in February 1690, was sent to England with Governor Andros, from which time I have found no further account of him.

Samuel Shrimpton was as has been stated, at one time, one of the Judges connected with the Superior Court. He

belonged to Boston and was the son of a brazier. He was born in 1643, and became a leading man in the colony. Under the old charter he was one of the Assistants, and was named one of Andros' council for Massachusetts. He however maintained the popular side in the controversy with the Governor, and it is related to his credit by Mr. Dummer, in his defence of the charters, that he was offered a new patent for his lands gratis, if he would accept it from Andros, but, though rich in such estates, he refused the offer, and submitted to having his lands seized, rather than yield to such an arbitrary exercise of power. He was one of the leaders of the troops at the time Andros was deposed, and became one of the committee of safety. He was then Colonel of the Suffolk regiment. He was selected to draw up a report of the proceedings of Andros while Governor of the province, which report was published in 1691, in the "New England Revolution justified."[1] From this selection it is to be inferred he was regarded as somewhat of a literary man, although I do not find that he was graduated at any college. He died of apoplexy, February 5, 1698, aged 55.[2]

Simon Lynde was associated with Col. Shrimpton as Judge. All that I have discovered in regard to him is that he belonged to Boston, as appears by a petition of his, on record, and, upon the authority of Farmer; that he had nine sons and two daughters, and was at one time a member of the Ancient and Honorable Artillery Company. Even the fact that he was a judge of the Superior Court

[1] The persons appointed for this duty by the committee of safety were Stoughton, Bartholomew Gedney and William Brown and such other members of the late council of Andros as they should advise with. (St. Rec.)

[2] Mr. Sewall says his funeral was attended by ten companies of troops, and his bearers were Maj. Gen. Winthrop, Mr. Cooke, Lt. Col. Hutchinson, Mr. Addington, Capt. Foster, and Maj. Walley.

is only ascertained by the record of his clerk.[1] He was the father of Benjamin Lynde, afterwards Chief Justice of the Superior Court.

Of CHARLES LIDGET another associate Judge, I have discovered somewhat more than in regard to Lynde. He belonged to Boston and was a merchant. He was one of the confidential friends of Andros, and was imprisoned with him at the Revolution. He was brother in law to John Usher, of whom more will be said hereafter, the latter having married his sister. He was Lt. Colonel of the Boston troops, an office of great honor in his day. Although a confidant of the Governor, he was suffered to go at liberty soon after the Revolution was effected, and was not sent to England with the most obnoxious of Andros' friends.[2]

JOHN WEST occasionally sat as judge of the Superior Court, but he was principally known by the extortionous exercise of his power as Deputy Secretary. He came from New York with Andros, and became one of his most confidential advisers.[3] He farmed the office of Secretary, of Randolph, and received the appointment of Deputy Secretary, May 3, 1687. He was also a practising Attor-

[1] By an entry in the Journal of Judge Sewall it appears that Lynde was buried Nov. 26, 1687. Bearers, Col. Shrimpton, Mr. Nowell, Justice Bullivant, Justice Hutchinson, Mr. Addington, Mr. Saffin.—"His Excellency there, went in a scarlet cloak."

[2] I copy the following notice from Judge Sewall's Journal, as it tends to show the gradual introduction of a looser state of morals under the influence of the new government which had been imposed upon Massachusetts: "1686, Sept. 3, Mr. Shrimpton, Capt. Lidget and others come in a coach from Roxbury about 9 o'clock or past, singing as they came, being inflamed with drink." He then mentions their stopping at a tavern, drinking healths, singing improper songs, &c., and adds, "Such high handed wickedness has hardly been heard of before in Boston." By another entry it appears that Shrimpton and Lidget were "bound over" for this "revel."

[3] "Thursday April 21, 1687, Mr. West of New York, his wife and family come to town in the even." (J. Sewall's Journal.)

ney in the court. He must have had a considerable share of shrewdness and cunning, for he contrived to cheat even Randolph out of his due share of the "spoils" of the office. He became intolerable to the people, and was seized with the Governor, confined, and refused bail. He was sent home to England with Andros and the other prisoners, and I discover nothing of him after that period.

Another who at times acted as Judge, as has been stated, was JOHN USHER who was too considerable a personage in his day to be omitted here. He was the son of Hezekiah Usher, and was born in Boston, April, 1648. His business was that of a bookseller. Dunton in his life and errors (2d Ser. Hist. Col. 2d, 10) says "he is very rich, adventures much to sea, but has got his estate by bookselling. This trade makes the best figure in Boston." This was written in 1685. He was one of Dudley's council, and also of the council with Andros, under whom he was Province Treasurer, and one of the few advisers whom the Governor condescended to consult. He, of course, went out of power with Andros, but in 1692, he was appointed Lieutenant Governor of the Province of New Hampshire, under Samuel Allen of London, who was appointed Governor, which office he held for five years. He was again appointed to it in 1702, under Governor Dudley, and held the office till 1715, when he retired from public life to his elegant seat in Medford, where he spent the remainder of his days. He died September 5, 1726, in the 78th year of his age. His connection with the government of New Hampshire was attended with many difficulties and embarrassments. He was personally unpopular, and had little of the statesman, and less of the courtier. He was fond of power, affected great severity in his demeanor, was loud in conversation, and stern in command. His public speeches were always incorrect,

and sometimes coarse and reproachful, and he wanted the accomplishment of a learned and polite education. He was however a faithful officer, and naturally of an open and generous disposition. His connexion with Andros was fatal to his popularity, and his deportment in office seems to have taken its character from that of his associates during his government.

Farwell and *Graham* were both from New York, and were brought into Massachusetts by Andros.[1] They were imprisoned with him at the Revolution and were of the number whom the Deputies refused to bail. Graham, at one time, was permitted to leave the castle to visit his family in Boston, where his daughter was sick, but was remanded to prison the next day. They were both sent to England with the Governor, in February 1689, and from that time I know nothing of their history. Their only connexion with the courts here, that I have discovered, was what has already been mentioned. They were probably educated as lawyers, and, so far as I can learn, were the only practitioners in the courts at that time who had been thus educated.

The members of the council of Andros, nominated for Massachusetts, were Joseph Dudley, William Stoughton, John Pynchon, Richard Wharton, John Usher, Bartholomew Gidney, John Tyng, Edward Tyng, Samuel Shrimpton and William Brown. For New Hampshire, Robert Mason and John Hinks. For Connecticut, Robert Treat, John Fitz Winthrop, Wait Winthrop, and John Allin. For New York, Anthony Brockholst, Francis Nicholson, Frederic Phillipse, Anthony Baxter, Henry Courtland, John Young, Nicholas Bayard and John Palmer. For Plymouth, Thomas Hinkley, Barnabas Lothrop, William

[1] Graham arrived here with his family, June 7, 1688. (J. Sewall.)

Bradford, Daniel Smith, John Sprague, John Walley, Nathaniel Clark and John Cothill. For Rhode Island, Walter Clark, Walter Newberry, John Green, Richard Arnold, John Alborrow and Richard Smith, while Edward Randolph seems to have been appointed without special reference to either province.

How many of these were called on to act in a judicial capacity, I am not able to determine. The business of the government was principally managed by Palmer, Brockholst, Mason, Usher and Randolph, under the advice of West, Bullivant and Graham.

Among the number who acted as Judges, at times, I have ascertained in addition to those already mentioned, Mason, Wait Winthrop, Gedney, Hinks and Nicholson. Pinchon acted as such in his own county, and Walley, Smith and Byfield in Rhode Island and Bristol.

Robert Mason was the grandson of John Mason, the proprietor of New Hampshire. His father's name was Tufton, but he took the name of Mason, and was declared proprietor of that Province by the King, in 1677. He resided at Portsmouth. He was both of Dudley's and Andros' council, but died, in 1686, at Esopus while on a journey with Andros from New York to Albany in the 59th year of his age.

Of *Wait Winthrop*, *Gedney*, *Walley* and *Byfield* I shall have occasion to speak in connexion with the courts at a later period.

Hinks belonged to Portsmouth, New Hampshire, and had but a short connexion with the government of Massachusetts. In 1692, he was a member of the council of that province when Usher was made Lieutenant Governor, but was removed from that office because their views did not coincide. In 1697, however, he was restored to the council, and was made President of that body. I have

other things he was a bigoted Episcopalian and made incessant war upon the churches of New England.

He was the bearer of the writ of Quo warranto against Massachusetts in 1683, and upon the dissolution of the charter, was made one of the council of Government under Dudley. He quarrelled with his associates and the President, and in his letters home abused them in no measured terms. In 1683 he was made Attorney General of New Hampshire by Gov. Crandal, who found in him a congenial spirit of mischief and cruelty. Under Andros, he was a member of the council, Licenser of the Press, and Secretary of the Province, which office he farmed to West as his deputy. His usual jealousy of disposition embroiled him with his associates under Andros, and his grasping avarice was disappointed of its ends by the equal or superior knavery of his retainers and dependents. There was not one redeeming quality in his character. He was mean, revengeful, cruel and extortious—and while he was universally dreaded he was as universally hated and despised. He was imprisoned and sent home with Andros at the Revolution, and died in the West Indies, retaining to the last his malignity towards New England.

I have thus traced the judicial institutions of Massachusetts through her period of subjection to arbitrary rule, and the reflection must have irresistibly arisen in the mind of every one who has followed me, that a people has but a precarious hold upon its liberties while the administration of justice is in the hands of men dependent upon the will of the rulers, for the time being, for the tenure of their office. Without being responsible to the popular will for the manner in which they conduct their office, and without the independence that admits of their following the dictates of their own judgments or consciences, they serve rather as the tools of a despot to op-

press, than as a safeguard to protect the people. And however much cause we may find to deprecate the subjection of a popular court to the influences of popular prejudices and popular delusions, it is refreshing to find ourselves once more approaching an administration where, though the popular will might be the guide, and the passions of the many might work individual injustice, at times, the zeal of honest minds was manifested in its measures, and in which a regard to the people's rights dictated its councils.

CHAPTER VII.

The Colony from the Revolution till the arrival of the charter of 1691.

Upon the breaking out of the Revolution and the imprisonment of their rulers, the people were in fact, without law and without government. But the habits of good order, the necessity of immediate action, and their cherished attachment to their former charter, led, at once, to the adoption of measures to continue the institutions of government, and to restrain any outbreak of the multitude. On the 18th of April 1689, Mr. Bradstreet, the last Governor under the charter, then 87 years of age, with several of the Magistrates chosen in 1686, and some of the principal inhabitants in the colonymet at the town house in Boston, and prepared a message to Gov. Andros, calling upon him to give up the reins of government. On the next day they issued orders for taking possession of the fort and stores, and on the 20th, calling to their aid some other of the principal inhabitants, assumed the title of "a council for the safety of the people and conservation of the peace." Among these was William Stoughton who with a kind of feline instinct, seems to have alighted safely on his feet, however violent may have been the overthrow of the administration of which he formed a part. Mr. Bradstreet was chosen President, Isaac Addington, Clerk of the Council, Wait Winthrop Commander in Chief and, John Foster and Adam Winthrop, Stewards. On the 2d of May

they recommended to the towns to choose Deputies to meet on the 9th of that month.

Without detailing the various steps taken by the Deputies and Magistrates, the government was settled, in form, agreeably to the charter, on the 24th of May 1689, and on the 5th of June, a new body of Representatives met in Boston. The charter magistrates were re-elected, and the administration of its political affairs went on in the colony as it had done before the revocation of the charter.

No change took place in the form of their government, until the arrival of Gov. Phipps with the new charter May 14, 1692. The people had been permitted, in the mean time, to enjoy their rights under their former system of institutions, and among these were the courts of justice which were remodeled upon the plan of their original organization.

The last term of the Court of Assistants and Admiralty under the old charter was held on the 15th of April 1686. And the next in order, as the records stand, was held Dec. 1689. It was held by Danforth, Deputy Governor, and the Assistants.

The last County Court or "Court of Pleas" in Suffolk under the charter, was held May 6, 1686, and "adjourned to Thursday 27th May inst. 1686 at 2 o'clock." Immediately following this entry, but in different ink, is written "and never met more, *Laus Deo.*" Immediately following this is entered "The court met again, *Laus Deo.*" These entries, probably having been made by successive clerks, serve to indicate the changes that took place in the politics of these officers.

The last record of the County Court in Suffolk, before the Revolution, was Oct. 26, 1686 and the next succeeding entry is July 30, 1689, by which it will be perceived, there is an entire omission of its proceedings during the period of Andros' administration. The term in July, as

above stated, was held by Simon Bradstreet, Governor, John Richards, Elisha Cook and John Smith, Assistants. It continued its sessions regularly until April 20, 1692, when it adjourned to the 2d of May following.

What I have said of the organization, powers and practice of the courts under the charter, will apply to them during the period between the Revolution and the arrival of Governor Phipps. On the 4th Sept. 1689, John Greene was chosen " Marshal General of the colony, until other order be made," and as such, he was called upon in December following, to execute the sentence of the law upon one who was tried by the Assistants for murder, and condemned to death. In January following there was a conviction for piracy before the same court, so that they seem not to have scrupled to exercise the highest judicial powers, notwithstanding the circumstances under which they resumed the government.

In order, it is supposed, to obviate any objection to the regularity of these proceedings, the General Court passed an order January 20, 1689, " for holding the courts of Assistants and County Courts in ordinary course." (St. Rec.) Anthony Checkly had been *chosen* Attorney General on the 14th June, 1689, and the system, such as it was, was thereby complete.

The forms of proceedings seem to have continued much as they were in 1686, and the names of the same Attorneys are found upon the records as were in practice under Andros, with the exception of those who left the colony with him.[1]

[1] The case of Goffe vs. Green, " Marshal of Middlesex " shows how little regard was had to form in seeking remedies by suit. It seems to have been designed to replevy a negro slave of the plaintiff, but the action was *case* for attaching him. The Jury found " for the plaintiff the negro man in controversy to be delivered to the said Goffe and costs of court."

There are however some circumstances connected with the administration of Justice during this period, that are worthy of notice. Thus in the action of Nathaniel Byfield and al. vs. Charles Lidgitand Francis Foxcroft, executors of the last will of Heywood, each of which parties, by the way, before or afterwards, held high judicial offices, the writ commands the Marshal to attach the goods or estate of the deceased in their hands, and, for want thereof, the *bodies of the Executors*. They were to answer "in an action of the case for not paying to the plaintiffs the sum of £8 10s. 6d. in money due by Book for cordage sold and delivered to said Heywood in the year 1689."

The action of Woodcock vs. Broadbent was *case*, for false imprisonment—the time alledged is "one month" in March 1688, but no place is mentioned where the imprisonment took place. It grew out of the arrest of Woodcock in the action Qui tam before mentioned.

I have transcribed a part of a precept against William Walley issued by Samuel Sewall, afterwards Chief J. Sewall, reciting the form of complaint, as an example of the looseness of the criminal proceedings under the court at this period. "Complaint being made to me by Winifield Chick, Spinster, of Roxbury that William Walley of said Roxbury, shoe maker, hath thrown stones at the house of Alice Chick a widow woman, her mother, putting them in fear by such actions and threatening words in the night season and that said Walley hath abused and slandered said Winifield Chick saying (the words are inserted) with such like revilings."—Then follows the precept to the officer to bring the offender "to answer for his misdemeanor hereof."

As tending to illustrate the law of Libel as it was understood before the charter of 1692, I have copied from the Records in Middlesex County under date December 18, 1689, an extract from the sentence against John Cutler,

who was ordered to pay a fine of £20 and to pay costs for "joining with Mr. Thomas Graves and some others in publishing a seditious libel against the Governor of this their Majesty's Colony as established by law."

Another case may be cited in this connexion, to show how little independence was exercised by the judiciary at this period. It is the case of Frissel vs. Usher, and grew out of Usher's conduct as Treasurer of the Province. Frissel prevailed in the County Court, and from this judgment Usher appealed to the Superior Court or Court of Assistants. The Jury again found against him "confirmation of the former judgment, being £20 5s. 8d. money and costs of courts allowed." The trial took place in December, and upon the verdict being rendered, the defendant produced an order from the King dated in September previous, "that the appellant, John Usher Esq. be not molested in his person or estate upon the account of his being treasurer, receiver General of his Majesty's revenue in New England, until his Majesty's pleasure be further known."

In endeavoring to illustrate the periods into which these sketches of our judicial history have been divided I may have wearied the patience of the reader by the minuteness of these details. I have been led to this course from a desire rather to furnish facts for the consideration of others, than to indulge in speculations of my own.

The charter with all its faults was dear to the people of Massachusetts. Under it they had grown into strength, and what was far more important, had been free. Their institutions were all popular, and they regarded with great jealousy any innovations on the part of the crown. But the time had come when they must give up many of their long cherished habits and opinions, and those who had lived in the palmy days of colonial republicanism ever afterwards looked back to the charter they had lost, with a pang of bitter regret.

CHAPTER VIII.

From the arrival of the Charter in 1692 *to the establishment of Courts of Justice, including the trials for witchcraft.*

The people of Massachusetts had entertained hopes that a charter which had been seized by the crown, as admitted by the English Commons, without law, (Chalm. 415) would be restored to them by the new king. And a bill for this purpose had actually been passed the House of Commons, when parliament was prorogued, and the bill consequently lost. The people were at length undeceived when on the seventh of October 1691, a new charter passed the great seal although it did not reach Massachusetts till May 14, 1692.

This charter embraced Massachusetts, Plymouth, Maine, Nova Scotia and the intervening territory, in one government, by the name of the "Province of the Massachusetts Bay in New England." Its provisions varied in many particulars, from their former charter, and some of these were far from being acceptable to the people. They no longer had the right to elect their own Governor or Lieut. Governor, the number of assistants or counsellors was increased to twenty eight, and all English subjects, as well as their children who might be born in New England, were entitled to become freemen within the Province.

An entire change was wrought in their courts of justice from those under the former charter. The General Court was authorised to erect "judicatories and courts of record,

or other courts," to be held in the king's name, with powers to try civil and criminal matters of every kind. The Governor and Council were made a Court of Probate, and appeals lay to the king in council in cases where the matter of difference exceeded the value of three hundred pounds.

The appointment of Judges, Sheriffs, Justices of the Peace and other officers of the courts was given to the Governor and Council, the nomination of such officers being to be made by the Governor, seven days, at least, before the appointment could be confirmed by the Council.

In case of the death or absence of the Governor from the Province, the Deputy Governor was authorized to act in his place, and in case of vacancy, in their offices, or the absence of both these officers, the major part of the counsellors were authorized to act in place of the Governor.

The tenure of the office of Judge was not fixed by the charter, but it practically became "durante bene placito," and upon the death, or resignation, or removal of a Governor or of the King, it seems to have been thought necessary to continue the former officers in commission by proclamation until new appointments could be made. (1 Doug. 472.) In 1741, upon the accession of Governor Shirley, this custom of renewing the commission of Judges upon the appointment of a new Governor, was suspended through the influence of Mr. Read, the great lawyer of his day. (2 Hutch. 336, n.)

The power of re-appointment however was still retained, and was, in fact, exercised by Governor Shirley himself in 1746; and in 1761, upon the death of the King, Governor Barnard issued his proclamation based upon the act of Parliament, continuing all commissions then existing, six months, during which time most of the places were filled by new appointments. But as some appointments

had not been made, the order for extending the commissions of such officers was renewed. (Prov. Rec.)

I have spoken of the appointment and tenure of office of the Judges of the courts as they existed to near the time of the American Revolution. During this period however, the courts were far from being independent of the people, since the amount and payment of the salaries of the Judges depended upon the popular branch of the General Court, and the power thus retained, was often exercised with an unsparing hand.

To guard against this dependence of the Judges, the crown made provision in 1773, for paying their salaries from the royal treasury, and few things gave greater offence to the people at large, than this interposition in behalf of the courts. With Judges whose only tenure of office was the will of the Governor, and who, by that arrangement, were to be entirely independent of the people, every one seemed to feel that his property and his life might be at the mercy of the mere creatures of a creature of the crown of England, and so strong was this feeling that only one of the Judges dared to receive his salary from the King.

Not, however, to anticipate what more properly belongs to a later period of this work, I revert to the organization of the courts under the new charter.

It will be perceived that, for the first time, the legislative and judicial powers of government were separated, even in theory. I say in theory, for, as there was nothing in the charter which expressly rendered the office of Judge incompatible with that of counsellor, we shall find that not only the Judges of the Superior Court sat as Counsellors, but in more than one instance the Lieutenant Governor was a member of that court and filled both offices at the same time.

But it nevertheless contemplated the erection of courts separate and distinct from the legislative and executive branches of the government, and in this, its provisions were unlike the former charter, as well as the commissions of Dudley and Andros.

The establishment of courts of judicature was, as already remarked, delegated by the charter to the Legislature, and we shall find that they early exercised this power upon their being first convened. But before we reach these courts, I must not omit to notice a special tribunal, created, nominally, under the new charter, but before the Legislature of the Province had had time to convene.

The court to which I refer was the special court of Oyer and Terminer created for the purpose of trying the persons in Essex and other counties charged with witchcraft.

I do not propose to give any account of that melancholy delusion which seized the public mind at the time of which I am speaking. Sir William Phipps who had been appointed the first Governor under the charter, was a thorough believer in the existence of witches and witchcraft. He moreover found the feelings of the people deeply excited against this imaginary exhibition of demoniacal power, and the prisons filled with the victims of this popular delusion. Urged on by the seeming emergency of the case, and sustained by the co-operation of many of the leading men, especially of the clergy, in the Province, the Governor issued his commission constituting the persons named in it a court to act in and for the counties of Suffolk, Essex and Middlesex.

The date of this commission was June 2, 1692, and the court convened at Salem upon the same day. No act of the General Court creating Judicial Courts had then been

passed, nor did that body hold any meeting till June 8th, six days after this special tribunal had begun its session. No act of the Legislature was, in fact, passed in regard to courts until the 28th of the same month. The conclusion therefore must be, that, as the Legislature alone could establish judicatories, the court which became so distinguished for its cruelty and misguided fanaticism, acted without any valid authority, and perpetrated by its punishments, a series of judicial murders without a parallel in American history.

The extent of the jurisdiction of this court may be judged of by the tenor of the commission which was issued by Governor Phipps to Anthony Checkley, July 7, 1692, to act as its Attorney General.

In that it is stated that he was to act in the court "assigned to enquire of, hear and determine for this time, all and all manner of felonies, witchcraft, crimes and offences how or by whomsoever done, committed or perpetrated within the several counties of Suffolk, Essex, Middlesex, or either of them. (St. Records.)

The court consisted of seven Judges, viz. STOUGHTON, Chief Justice, NATHANIEL SALTONSTAL, whose place was afterwards supplied by JONATHAN CURWIN, JOHN RICHARDS, BARTHOLOMEW GEDNEY, WAIT WINTHROP, SAMUEL SEWALL and PETER SERGEANT. Their first meeting as I have stated, was at Salem on the 2d of June. They met again on the 28th of the same month, on the third of the following August, and the ninth of September. Their last meeting was upon the 17th of that month, after which the court was dissolved. The expenses of the court to the county of Essex was £130 which was assessed upon the inhabitants of the county. (Felt's Salem, 316.)

During this short period, nineteen persons were tried, condemned and hung for witchcraft, and one was pressed

to death. This was *Giles Corey*, and it is the only instance that I have discovered where the horrible death, by the common law judgment of "*Peine fort et dure*" has been inflicted in our country. He refused to plead to the indictment against him, knowing that a trial was but the form of convicting him of a felony, by which his estate would be forfeited to the King; and when called upon to answer to the charge against him, stood mute, notwithstanding the importunities and threats of the court, and entreaties of his friends. He was sentenced on the 9th, and suffered on the 19th of September. He was eighty years of age and "as his aged frame yielded to the dreadful pressure, his tongue protruded from his mouth. The demon who presided over the torture, drove it back again with the point of his cane." (Upham's Lec. 88.) Such is the tender mercy of fanaticism.

Before proceeding to give a detailed account of the mode of managing these trials, I will offer the form of one of the indictments under which the unfortunate victims were tried and executed.

"The Jurors &c. present that Mary Osgood, about eleven years ago, in the town of Andover, wickedly, maliciously and feloniously a covenant with the Devil did make and signed the Devil's Book and took the Devil to be her God, and consented to serve and worship him, and was baptized by the Devil and renounced her former christian baptism, and promised to be the Devil's, both soul and body, forever, and to serve him; by which diabolical covenant by her made with the Devil she is become a detestable witch, against the peace, &c." (1 Hist. Col. 7th, 241.) Other indictments charged the prisoner with sorcery and witchcraft acted upon the body of such an one at such a time, whereby the afflicted person was wasted consumed and pined, &c.

The course of proceeding in the trial was as follows. After pleading to the indictment, if the prisoner denied his guilt, the afflicted persons were brought into court, and sworn as to who afflicted them. This testimony having been given in, the "confessors" as they were denominated, that is, those who had voluntarily acknowledged themselves witches, were called upon to tell what they knew of the accused. Proclamation was then made for all who could give any evidence *against* the prisoner, to come into court, and whatever any one volunteered to tell, was admitted as evidence however foreign from the charge for which the prisoner was on trial. The next process was to search the prisoner for "witch marks," which was done by the Jury, who often returned that upon such and such parts of his body, was found a preternatural excresence. And a wart or a mole became witnesses against the person it deformed.

I have relied for the above account upon a statement made by Mr. Brattle, an eye witness of these trials, which is published in the 5th Hist. Col. 60. At the time he wrote, nine had been condemned besides the nineteen who had been executed, and Mr. Corey who had been pressed to death, and there were fifty more in prison who had confessed themselves to be witches. Indeed escape seems to have been impossible, and a trial was but the form of executing popular vengeance. Juries were intimidated by the frowns and persuasions of the court, and by the outbreakings of the multitudes that crowded the place of trial, to render verdicts against their own consciences and judgment.[1]

[1] At the opening of the court the Chief Justice in the first charge which he gave to the Jury, "told them they were not to mind whether the bodies of the afflicted were really pined and consumed as was expressed in the indictment, but whether the said afflicted did not suffer from the accused such afflictions as

In the case of Rebecca Nurse the Jury brought in a verdict of not guilty, upon which the accusers raised a great outcry, and the judges were overcome by the clamor. They expressed their dissatisfaction with the verdict, and one of them in terms of great vehemence. Another of the Judges declared that she should be indicted over again. The Chief Justice told the Jury they had overlooked one important piece of evidence, which was an expression of surprise, as the court construed it, of the prisoner at the testimony of a witness. They were therefore sent out again, and again returned for an explanation of this expression. The prisoner frankly stated her surprise at seeing a fellow prisoner brought up as a witness against her, and that the expression she had used arose from her inability to hear what was said by the foreman of the Jury on account of her deafness. The Jury however soon returned a verdict of guilty and she was executed accordingly. (Upham's Lec. 84. 2 Hutch. 54.)

I have stated that the last meeting of this court was upon the 17th Sept. They then adjourned to the first Tuesday in November; but in the mean time the legislature met, the public mind began to be enlightened, the mania upon the subject of witchcraft began to subside, and before the time to which the court was adjourned had arrived, the court was dissolved.[1]

naturally *tended* to their being pined, consumed &c. This said he, is a pining and consuming *in the sense of the law.*" (Brattle.) As I am not aware that this rule of practice has ever been reversed, I suppose it must be regarded as the law in all matters relating to trials of witches which may hereafter arise in the court.

[1] I am led to believe that this court had, in reality, ceased to be regarded as having any authority before any formal act dissolving it was adopted. J. Sewall in his Journal has the following entry under Oct. 26, 1692, "a fast and convocation of ministers is ordered by bill, "that we may be led in the right way as to the witchcraft. The season and the manner of doing it is such that the Court of Oyer and Terminer count themselves thereby dismissed."

For the credit of New England it would be well if oblivion could settle down over this period of her annals. But the history of that court furnishes a lesson which ought never to be forgotten. It was a popular tribunal, there was not a lawyer concerned in its proceedings. Every rule of evidence by which the courts of common law are governed was abrogated, and Judges and Jurors were left, untrammelled by the "quibbles of the law," to follow their own feelings and the popular will. Human nature may have changed, and a court equally popular and equally unacquainted with the rules which govern judicial proceedings, might stand against a strong popular delusion or excitement, should such an occasion again occur, but he must disregard the light of experience who could hope to be safe under its administration. Is it to be believed that abuses as monstrous as the whole proceedings of that court, in fact, were, could have been tolerated, had there been an enlightened bar in Massachusetts whose services should have been exerted in favor of the accused? It was not for the want of learning or honesty on the part of those who were engaged in those trials, that injustice was done. It was that their habits of thought, their entire ignorance of the salutary rules of law, and their want of familiarity with the process of investigating the merits of judicial controversies, unfitted them to hold the scales of justice with impartial hands, and to discriminate between the excited prejudices of the many, and the truth or falsehood of the charges which they were called upon to examine.

I have said the Judges were honest and learned men, and so far as it relates to most of them, certainly, the remark is true. STOUGHTON, the Chief Justice, had been educated a clergyman, had been long in public life, was afterwards Chief Justice of the Superior Court, and was at that

time Lt. Governor of the Province. He retained his belief in witchcraft till his death. SEWALL had been educated a clergyman, and was afterwards Chief Justice of the Superior Court. WINTHROP was by profession a physician, and was also a member of the Superior Court. RICHARDS was a merchant, and with CURWIN was also a member of that court. These will be noticed hereafter, when enumerating the Judges of the Superior Court under the Provincial charter.

NATHANIEL SALTONSTAL was of Haverhill. He was born in 1639, and was grandson of Sir Richard Saltonstal, one of the original grantees of the Patent. He was graduated at Cambridge in 1659. He became distinguished as a military man, and is spoken of by Randolph as among the most popular, and well principled military men of the day. He successively held the offices of Major, and Colonel, then places of honor and responsibility. He was one of the Assistants when Dudley's commission as President arrived, and on that account declined acting as a member of his council, although named as such in his commission. He was from time to time, placed upon important commissions connected with the claims and disputes concerning the Narraganset country, but was not one of Andros' Council. Upon the deposition of the latter, he was associated in the government, and was an Assistant till the arrival of the new Charter, under which he was commissioned as one of the Council. Though one of the Judges of the Court of Oyer and Terminer as above stated, he seems to have been free from the prevailing delusion of the time, and early left the bench, refusing to proceed in the trials in which that court were engaged.[1] The powers of his mind were of a superior order, and he held through life a

[1]He became a member of the C. C. Pleas for the County of Essex in 1702 and retained the place until his death.

distinguished rank in the Province. He married the daughter of the Rev. John Ward of Haverhill, and was the father of Gurdon Saltonstal, Governor of Connecticut. His Grandson, Richard Saltanstal, was one of the Judges of the Superior Court of Massachusetts. He died May 21, 1707, at the age of 68.

Peter Sergeant was of Boston, and is called by Douglas in his account of this court, simply "Mister." He was a man of considerable influence in the colony, and took an active part in the revolution, being one of the persons who addressed Andros in relation to his abdicating the government, and who assumed the government on that occasion. He was commissioned as one of the council under the new charter, and was elected a member of that board from year to year till 1703, when Dudley, having been made governor, negatived his election on account of the part he had taken in imprisoning Dudley at the Revolution. He was elected the following year, and again negatived, and although a leading and popular member of the party headed by Mr. Cooke, was not again elected to the council. He married the widow of Governor Phipps, and was, I believe, a merchant. When the courts of Common Pleas were established, he was appointed a Judge of that court for Suffolk, and held the office till Dudley's elevation to the executive chair, when he was removed from this office, as he had been from that of counsellor, and seems not to have again held any judicial office.

Bartholomew Gedney, the remaining Judge of this court, belonged to Salem. He was a practising physician. He was born in 1640, and was made a freeman in 1669. From 1680 to 1683 he was an assistant and a member both of Dudley's and Andros' councils. He joined Governor Bradstreet and others when they assumed the government on the imprisonment of Andros and was named as a coun-

sellor in the new charter. In 1690 he commanded an expedition in the war with the French and Indians in Canada. In 1692 (Oct. 3,) he was appointed Judge of Probate for Essex county, and the same year was made one of the Judges of the Court of Common Pleas for this county. He commanded an expedition against the Eastern Indians in 1696, and was constantly engaged in public or military life until his death which took place February 28, 1698-9, at the age of 58. In a character given of him by Mr. Felt, it is said "though elevated by men, yet he bowed in reverence and faith at the cross of Christ.—He was cut off in the midst of extensive usefulness and growing respectability."

Mr. CHECKLEY, who acted as Attorney General for this court was a merchant, and a military man. As before remarked, no lawyer seems to have had any thing to do with this court. There was not, in fact, any one in the Province at that time who had been educated to the bar.

That the Judges who sat in these trials were honest in their belief in witchcraft, and in their zeal to suppress it, appears not only from their own conduct and declarations, but from the estimation in which they were held after the delusion had passed away.

Sewall was certainly among the most learned, pious and honest men in the Province. His journal to which I have referred and may again refer, is a faithful daily record of his thoughts and feelings, and of the events, even the most trifling, that were passing around him.

Under date, September 19, 1692, he narrates the fact that about noon Giles Corey was pressed to death for standing mute, and on the following day is this entry. "Now I hear from Salem that about 18 years ago he (Corey) was suspected to have stamped and pressed a man to death, but was cleared. It was not remembered till Anne Putnam was told of it by said Corey's spectre, the Sab-

bath day night before the execution." If any one could doubt the honesty of this credulity, his doubt would be removed by the public confession offered by Judge Sewall in 1697, on the occasion of a public fast which was appointed by the General Court, "that God would pardon all the errors of his servants and people in a late Tragedy, raised amongst us by Satan and his instruments." (1 Doug. 451.)

I copy this confession from his journal, as offering a noble proof of his purity of heart and magnanimity of spirit in the humble acknowledgment of his errors which it offers. "1696-7, January 15. Copy of the Bill I put up the Fast day, giving it to Mr. Willard as he passed by, and standing up at the reading of it and bowing when finished, in the afternoon.—Samuel Sewall, sensible of the repeated strokes of God upon himself and family, and being sensible that as to guilt contracted upon the opening of the late commission of Oyer and Terminer at Salem (to which the order for this day relates) he is upon many accounts more concerned than any that he knows of, desires to take the blame and the shame of it, asking pardon of men and especially desiring prayers that God who has an unlimited authority, would pardon that sin and all other his sins, personal and relative, and according to his infinite benignity and sovereignty, and not visit the sin of him or of any other upon himself or any of his, nor upon the land, but that he would powerfully defend him against all temptations to sin for the future, and vouchsafe to him the efficacious saving conduct of his word and spirit."

It is not therefore on account of their having yielded to a common delusion in believing in the existence of the crime of witchcraft, that I have been so minute in this account of the proceedings of this court. So far they were sustained by the prevailing opinion of the age in which

conferred by the charter and the first act of the General Court.

The first of these in dignity and importance was the SUPERIOR COURT. It was to consist of a chief and four associate Justices, three of whom could form a quorum. Its jurisdiction extended to all actions, real, personal and mixed, as well as to all pleas of the crown, and it was moreover, a court of assize and general jail delivery. It had original and concurrent jurisdiction with the Inferior Courts in all matters of freehold, and in all actions of ten pounds value and upwards, and the party who was cast in the suit had a right to a review of the action as a matter of course. It had also appellate jurisdiction over all matters brought from the inferior courts by appeal or writs of error.

The Judges were further empowered to establish all necessary rules and orders to govern the practice in their courts.

By an act of the same year (1692,) the power of granting writs of Habeas Corpus was conferred upon the Justices of this court.

By the provisions of the charter all laws were required to be sent to England for the approbation of the King, and consequently the act creating these courts was in a measure inchoate until the action of the King in council, should be had thereon. From the necessity of the case, however, the Governor and Council proceeded to appoint Judges of the several courts, and on the 7th December, 1692, four of the five Judges of the Superior Court were commissioned and the fifth was commissioned soon after.

The court, as thus constituted, consisted of William Stoughton, Chief Justice, Thomas Danforth, Wait Winthrop, John Richards and Samuel Sewall.

The first term of the court was held at Salem on the

third of January, 1692-3, as a court of assize and general jail delivery, being a special term, and occasioned by the great numbers still in jail upon the charge of witchcraft. Fifty six bills of indictment were preferred for this offence at this term, of which the Grand Jury returned thirty "ignoramus" (as was then the form of proceeding) and of the twenty six returned by them as "true bills," three only were sustained by the traverse Jury, and the persons thus convicted were pardoned. Upon Governor Phipps' returning to England about 150 were in prison, and about 200 under the charge of witchcraft, all of whom were discharged upon paying the Attorney General 30 shillings each. (1 Doug. 450.)

The number of persons here spoken of, probably included the counties of Suffolk and Middlesex, for the same Judges who held the special term in Salem, held a term also in Charlestown on the 31st of the same month which was the time fixed by the statute as the regular term of the court. The court was regularly held in the various counties till the death of Governor Phipps. This took place February 18, 1694-5, in England, where he had gone to answer certain charges which grew out of his rough and violent treatment of individuals, among whom was a master of a public vessel whom the Governor, for some provocation, publicly caned in the street in Boston.

At the term at Plymouth in 1694, which was held by Danforth, Winthrop and Sewall, among the actions that stood for trial was one wherein Sewall was plaintiff and Winthrop defendant, and another wherein Chief Justice Stoughton, then acting Governor, was plaintiff and Seth Perry defendant. If the scales of justice were balanced in the one case, the defendant in the other incurred some hazard in presuming to "refuse to pay a bond," as he is charged in the declaration, where his antagonist possessed

such means of changing the preponderance of his own end of the scale. Neither action however was tried at that term, nor have I learned what was their final disposition. They are alluded to rather as showing the fact that the Judges took cognizance of cases in which they were parties, than from any other importance they possess.

The commissions of all the Judges except Richards', were renewed in 1695, on account, as I suppose, of the death of Governor Phipps. Richards had died in the mean time, and his place had been filled by the celebrated Elisha Cooke, the elder of the two of that name who filled important places in the public councils as popular leaders in their respective periods.

No other changes in the court need be noticed till 1699, when an order from the King disallowing the act creating the courts was received. It happened that the court was then in session and in the midst of a trial. The news reached them after the adjournment for the day, on the 26th April. On the morning of the next day the Judges did not repair to the court house at the tolling of the bell, as was customary, but in the afternoon they went into court and explained to the people the news which had been received, and took the papers of the case then on trial from the jury, and the court was dissolved. (Sewall's journal.)

On the 26th of May, of the same year, Lord Bellamont arrived at Boston, as successor to Governor Phipps, and in his first speech to the General Court on the 2d June, officially announced the disallowance of the act of 1692, and recommended the revival of the courts by such a bill as the King would approve. On the twenty sixth of the same month bills were passed establishing courts of Justice, and continuing such actions in force as had been entered in the former courts and discontinued by their being dissolved. (St. Rec.)

Instead of a general act creating these courts as had formerly been done, separate acts in relation to the Superior and the Inferior Courts and Courts of General Sessions were passed, while the erection of a Court of Chancery which had been the cause of the former act being disallowed, was wholly omitted.

By the act of 1699, the Superior Court was to consist of the same number of Judges as under the former act, and its jurisdiction after specifying all matters of a civil and criminal nature, including appeals, reviews and writs of error, is extended generally to all matters "as fully and amply to all intents and purposes whatsoever, as the Courts of King's Bench, Common Pleas and Exchequer, within his Majesty's Kingdom of England." (Prov. Laws, 330.)

Two years after this, the court was empowered to adopt rules of practice, and appoint its own clerk. And, as it appears from the records, the Governor and Council were authorized not only to call special meetings of the court for the trial of criminals in certain cases, but to appoint special Judges of the court to sit in the trial of particular causes or particular classes of causes, in which the stated Judges either declined acting, or thought themselves incompetent on account of interest. No other change that I am aware of, took place in the organization of the Superior Court until the American Revolution.

The number of instances of special appointments of Judges is too great to be enumerated here, nor am I sure that I have discovered them all. Among them however I may mention the following. Samuel Thaxter[1] and Thomas Berry[2] were appointed in 1735 special Justices for

[1] Samuel Thaxter was of Hingham and was long engaged in public life.

[2] Thomas Berry was of Ipswich, a physician, and one of the Judges of the Court of Common Pleas of Essex.

the county of Suffolk in cases wherein the town of Boston was concerned. Benjamin Prescott[1] was appointed in the same year for Worcester, and two years afterwards for the county of Suffolk.

In 1737, Nathaniel Hubbard[2] was appointed for Suffolk in a case of the town of Boston, and Job Almy[3] at the same time was appointed to act in the case of Aaron Knapp.

In 1738, Thomas Greaves[4] was appointed in the place of Judge Edmund Quincy, to hold his office during the absence of Mr. Quincy as the Province Agent in London.

In 1747, John Cushing,[5] Sylvanus Bourn[6] and Joseph Pynchon[7] were appointed Justices of the Superior Court, "in all cases relating to the silver scheme." And in the following year John Jeffries, William Brattle[8] and Thomas Hubbard[9] were placed upon the bench to act, in stead of Richard Saltonstal, Stephen Sewall and Benjamin Lynde, "in all cases relating to the society engaged in the emission of 120,000 pounds in notes of hand redeemable with silver, commonly called the Silver Bank," which is doubt-

[1] Prescott lived in Groton and died August, 1738, aged 42. He was the father of Col. William Prescott, who distinguished himself as an officer at Bunker Hill. He was a member of the Council.

[2] Hubbard was afterwards one of the standing judges of the Superior Court.

[3] Almy belonged to Bristol County, and was a Judge of the Common Pleas in that County, and at one time represented Tiverton, then in Bristol County.

[4] Greaves was afterwards one of the standing judges of this Court.

[5] Cushing was soon after appointed one of the standing judges of this court.

[6] Bourn was a Judge of Court Common Pleas for Barnstable and died 1768.

[7] Pynchon was of Hampshire County and a Judge of the Court of Common Pleas for that County in 1741.

[8] General Brattle was of Cambridge and is noticed in another part of this work.

[9] Hubbard was of Boston, a representative of that town, Speaker of the House and afterwards a member of the Council.

less the same "scheme,"[1] referred to in the appointment of Cushing &c., above mentioned.

Without mentioning the cases in which they acted I will add the names of such of the special justices as have fallen under my observation, since I should be glad to preserve the names, at least, of all who have acted as members of this court, even if only in particular cases. Ezekiel Cheever[2] was frequently called to this duty. Seth Williams,[3] William Ward,[4] Andrew Oliver,[5] Samuel Danforth,[6] Thomas Hutchinson,[7] (father of the Governor,) Joseph Richards, John Chandler,[8] Benjamin Lincoln,[9]

[1] The "scheme" here alluded to was one of the many plans devised during the latter part of the administration of Governor Belcher and the early part of that of Governor Shirley to counteract the ruinous effects of the bills of credit and other financial measures which had been adopted and pursued till public credit and private wealth were well nigh annihilated. The "silver scheme" was conceived as a means of remedying the evils of the "Land Bank" or "Manufactory scheme"—but it would swell this note to an unreasonable extent if any thing like a full statement of the nature and variety of these schemes were attempted, and they are therefore purposely omitted.

[2] Cheever belonged to Charlestown and was frequently a member of the General Court.

[3] Williams was of Bristol County and a Judge of the Common Pleas in that county.

[4] Ward belonged to that part of Marlboro' afterwards Southboro', and was a judge of the Court Common Pleas for the county of Worcester.

[5] Oliver belonged to Salem, a son of Lieutenant Governor Oliver and a Judge of the Common Pleas for Essex.

[6] Danforth was Judge of Probate and of the Court Common Pleas of Middlesex County.

[7] Hutchinson was of Boston, and long a member of the council.

[8] Chandler was of Worcester, and Chief Justice of Court Common Pleas for the county of Worcester.

[9] Lincoln was of Hingham and father of the celebrated General Benjamin Lincoln of the Revolution.

Samuel White [1] and Joseph Lee, [2] in addition to those above mentioned, were among the special justices of this court.

The commissions to the standing judges under the act of 1699, were granted on the 25th July following the passage of the act and the former members of the court were re-appointed. Without giving here the changes that took place in the incumbents of this office under the Province charter, I propose in another part of this work to notice each of these judges individually, and shall therefore proceed with the powers which they exercised by virtue of their commissions.

In common with courts of Common Pleas, this court had authority to chancer penalties annexed to any specialties upon which suits were pending, and to enter up conditional judgments in actions upon mortgages, and also to decree a redemption of mortgaged estates, where the mortgagor or his assigns should have paid or tendered the amount due, &c., within three years from the time of entry made by the mortgagee for condition broken. This authority was given in 1698, although, at that time, the act creating a court of Chancery was considered as in force. (Prov. L. 324.)

I do not find that any further chancery powers than these were granted to any court after 1699, so long as the charter was in force.

Another power was exercised by this court which gave great offence to the officers of the crown, and the exercise of which was made a ground of complaint against the Province, and that was the power of granting *prohibitions*

[1] White was of Haverhill, and was afterwards a member of the Provincial Congress.

[2] Lee belonged to Cambridge, was a Judge of Court Common Pleas for Middlesex, and a Mandamus Counsellor.

to the other courts, and restraining them from an undue exercise of jurisdiction, especially the Court of Admiralty. This court, of which I shall have occasion to speak hereafter, was created by the crown under a power reserved in the charter, and its officers received their commissions from the King, or the Lord High Admiral. This naturally led to a jealousy between tribunals thus differently constituted, and the Judges of the Admiralty Court were frequent in their complaints of the interference of the common Law Courts of the Province with their jurisdiction. Mr. Dummer in his defence of the charter, examines this ground of complaint, and while he shows that the power of issuing writs of prohibition to Courts of Admiralty, as well as other courts of limited jurisdiction, clearly resided in this court, he goes on to show that it had never been exercised improperly in the Province, and that the existence of such a power was essestial to the preservation of the liberties of the people.

He says that there had been but three instances in which that power had been exercised, and those only after solemn argument by the ablest lawyers.

It is no part of the object of this work to give the political history of this Commonwealth, and therefore there will be no attempt to trace the connexion of the Superior Court with the political occurrences in which they were more or less involved.

If we were to trace the connexion of the members of the Superior Court with the politics of the day, it would be difficult to separate the judicial from the general history of the Commonwealth during this period, since the judges were frequently engaged as immediate actors in public affairs.

There was no legal incompatibility between the office of a Judge of the Superior Court, and that of a Counsellor, a

Representative in the General Court or even that of Lieutenant Governor.

In 1762, under Governor Bernard, there was an attempt made in the legislature to exclude the Judges of the Superior Court from a seat either at the Council board or in the House of Representatives. The Chief Justice, Hutchinson, at that time held the offices of Lieutenant Governor, Counsellor and Judge of Probate for the county of Suffolk.

This attempt was however defeated by a majority of seven.

The popular party adopted a much less honorable, but perhaps under the circumstances an excusable means of limiting the power of this court, and that was by reducing the salaries of its judges.

The power of appointment had been given, by the charter, to the Governor and council, but the tenure of the office was not defined.[1]

The Governor and council until 1774, exercised the power of removing the Judges at will, and the only check to this power was the apprehension of responsibility to the King in council for an abuse of it. But after that time the office of judge of the Superior Court was held during the pleasure of the Crown. (2 Hutch. 337, n. 3 Hutch. 390.)

The court was always dependent upon the legislature for their salaries until 1772, when an arrangement was made, to the great dissatisfaction of the people, for their receiving their salaries from the Crown. So great indeed was the feeling of opposition to this, that all the judges except Oliver declined accepting salaries in this form. This conduct on the part of Oliver was made one of the grounds of the

[1] Douglas says that the Governors nominated *durante bene placito* all Judges, Justices and Sheriffs.

impeachment which the house of representatives exhibited against him before the council.[1]

In 1774, a change was made in the mode of appointing the judges of this court as well as removing subordinate officers by conferring the power upon the Governor alone. At the same time the election of counsellors was taken from the legislature and assumed by the Crown, and their appointment by "Mandamus" gave rise to the name which conferred no enviable notoriety upon those whom the King thus undertook to honor.

The salaries received by the members of this court were always inconsiderable, and do not appear to have been uniform in amount. I have ascertained the sums paid them at several periods, and from these some judgment may be formed of what their salaries usually amounted to.

In 1702, Judge Hawthorn received £50 as a year's salary. (Felt's Sal.)[2] In a letter to Lord Hillsboro, Governor Hutchinson says the salaries of the Judges are only £120 sterling, their fees not paying their travelling ex-

[1] The council never acted upon this impeachment. When the articles were exhibited before the council the Governor abandoned the chair, and it became questionable whether the council could act upon the subject in his absence. Hutchinson says this was the second attempt in the Province to impeach an officer, the first having been made under Dudley's administration. The Governor contended that the council had no judicial authority whereby to try impeachments, their judicial powers being limited to cases of divorce and appeals from inferior courts of Probate. Before the controversy growing out of this impeachment had been concluded, the government had expired.

[2] In 1748, Douglas says that the five judges received £4000 old tenor or £800 cash. The ratio of depreciation of the old tenor money at that time was as 10 or 11 to 1, so that each judge, must probably have received less than $350 a year at that time.

It is stated in Boston Evening Post, (Nos. 1664 and 1667) that the salaries fixed by the crown in 1767 were as follows: viz. Chief Justice of Superior Court £500, Secretary of the Province £300, Justices of the Court of Common Pleas each £100, Chief Justice of that Court £300 sterling.

penses, as one of them had been from home nine months in a year attending courts. (Mass. Spy.)

Chief Justice Oliver complained that his salary had never supported him, and that he had suffered more than £3000 by holding the office, and he pleaded this as a reason for taking his salary from the king.

At the time of the change in the mode of paying the judges, 1772, the Chief Justice's salary was £200, and that of his associates £160. The salary then fixed by the Crown for the Chief Justice, was £400, and that of the associate Justices £200 each. The Attorney General was to receive £150, and the Solicitor General £50 a year.

Notwithstanding the very meagre provision made for the judges, there was much of imposing style and dignity in the costume of the Court, and the manner in which their Sessions were held.

When they went upon their circuits, the Sheriff of the County and a number of gentlemen met them at the borders of the shire town, and conducted them to their lodgings with great parade.

Judge Sewall in his diary, in describing his journey from Cambridge to Springfield to hold a court in 1698, says, "a guard of 20 from Springfield met us there (at Quaboag —Brookfield,) and saluted us with the trumpet as we alighted."

The custom of opening the courts with prayer was then an established one, but the court did not seem to depend altogether upon the clergy to perform this duty. In Sewall's journal he states, under date January 6, 1702, "the Chief Justice prays at the opening of the court at Charlestown." And a similar entry is made under date of January 28th of that year. Nor were these solitary instances of the same ceremony being performed by members of the

obvious reason, however, for this was, that
court had been educated clergymen.

by any description of my own, give so accurate
he state and manner of the Courts before the
as by transcribing the following graphic pic-
he pen of the first President Adams to Mr. Tu-
cribing the Court before whom the question, as
nting of "writs of assistance" was argued in
ne place in which the court sat was the council
n Boston. "In this chamber near the fire, were
e judges with Lieut. Governor Hutchinson at
l, as Chief Justice, all in their new fresh robes of
nglish cloth, in their broard bands and immense ju-
gs. In this chamber were seated at a long table all
sters of Boston, and its neighboring County of Mid-
in their gowns, bands and tye-wigs. They were
ted on ivory chairs, but their dress was more solemn
re pompous than that of the Roman Senate when
uls broke in upon them. In a corner of the room
e placed, wit, sense, imagination, genius, pathos,
, prudence, eloquence, learning, science, and im-
reading hung by the shoulders on two crutches cov-
with a cloth great coat, in the person of Mr. Pratt,
had been solicited on both sides, but would engage on
er being about to leave Boston forever, as chief jus-
of New York."

he court who sat on this august occasion, were Chief
tice Hutchinson, Benjamin Lynde, John Cushing, Peter
ver and Chambers Russell. The counsel engaged were
idley in favor, and Thatcher and Otis against the appli-
tion, and in the words of President Adams, "then and
ere was the first scene of the first act of opposition to
ie arbitrary claims of Great Britain. Then and there the
hild Independence, was born."

The last term of this court was held in Sept. 1774, and its powers under the charter were, in fact, vacated in October of that year when the Provincial Congress first assembled. There was not, however, any formal act of legislation vacating the offices of the Judges of the courts until 1775, when an act was passed by which all offices created under the royal government, were to cease on the 19th September of that year.

The last term of the court was held without a jury, as the members of the panel who had been summoned, refused to be sworn because the charter had been violated in the appointment of the "Mandamus Counsellors," and the Judges, and because Oliver, who had been impeached, acted as Judge.[1] The court consisted, at the time of its dissolution, of Chief Justice Oliver, Trowbridge, Foster, Hutchinson, William Cushing and William Brown. Of these Cushing alone was re-appointed under the new organization of the court.

The judges of this court on the very memorable trial of Captain Preston which took place in 1770, for the part taken by him and his soldiers in the "Massacre," were Chief Justice Lynde, John Cushing, Oliver and Trowbridge. And as illustrative of the condition in which the court were placed by the turbulent state of the times, and their dependence alike upon the Governor and the legislature, it is stated by Governor Hutchinson, in a private letter, that he found it difficult to prevail upon three of the judges to sit in this trial for fear of losing their popularity. And he speaks in high terms of Judge Oliver's firmness in charging the Jury against the "false principles of government lately preached up."

The following extract from a letter of Governor Hutch-

[1] Oliver, Hutchinson and Brown had been made Mandamus Counsellors.

inson under date August 28, 1770, throws further light upon this subject. "I have persuaded Judge Lynde, who came twice to me with his resignation in his pocket, to hold his place a little longer. Timid as he is, I think Goffe (Trowbridge) more so. The only difference is, little matters as well as great, frighten Lynde. Goffe appears valiant until the danger or apprehension of it rises to considerable height, after that he is more terrified than the other. Judge Oliver appears to be very firm, though threatened in yesterday's paper and I hope Cushing will be so likewise."

The term of the court which was to have been held on the 1st November, 1774, at Salem, was adjourned by the sheriff, by order of two of its Justices, until the Monday preceeding the 3d Tuesday of June, 1775, but the events that transpired in the mean time, prevented the adjourned term from ever being held.

The interval between the dissolution of the old courts and the organization of the new, exceeded a year, but the defect of courts of justice was in some places supplied by the establishment of local tribunals for the trial of causes,[1] but more by the spontaneous action of the people in restraining crime and enforcing justice.

Although we have reached the period to which I proposed to confine these enquiries, it may be remarked that

[1] Without wishing to multiply the accounts of these courts, I have selected a single instance by the way of illustration from the records of the town of Attleboro'. At a town meeting, December 6, 1774, voted to have a Supreme and Inferior Court in this town, and chose four men to stand and serve as Superior Judges to hear and determine controversies that have or may arise in this town. Then voted and chose seven persons as Judges of the Inferior Court in this town. (Then follow the names of the Judges.) Voted that we will comply with, stand to and abide by the resolves, instructions and directions of the Continental and Provincial Congresses, and that all persons who shall refuse to comply with them, shall be dealt with as infamous persons."

the time of the courts resuming the administration of justice was different in different counties.

In Essex a term of the Superior Court was held June 28, 1776. In Worcester, September 25, of the same year, and in Suffolk, the earliest record of a term of the court that I find is August 25, 1778.

It would need no great aid of the imagination to conceive the change in circumstances under which the new court convened, compared with those under which the old court last assembled.

It was the same people, and the same laws, but the events of a few months had more essentially changed the political condition of the state than centuries had done in the old world. And worthily did the people and their tribunals of justice sustain themselves in their new relations. Justice as well as liberty has ever been triumphant here under the constitution of a free government.

Court of Chancery. The act of 1692, creating the Province Courts provided for a High Court of Chancery, to be kept by the Governor or such other person as he should appoint chancellor, to be assisted by eight or more of the council.

From their decisions appeals lay to the King in council, and full equity powers were delegated to the court.

Chancery powers were, by the same act, extended to all the courts of the Province, so far as to chancer the penalties of bonds when in suit before them.

The following year the constitution of the court was so far modified as to be held in Boston by three commissioners appointed by the Governor and council, assisted by five Masters in Chancery. The court had the power of appointing its own register, and other necessary officers, and legal process was to be issued under the Province seal and to bear the *teste* of the three commissioners.

The court held four terms in each year, but was to be always open to suitors.

This law did not, however, meet the approbation of the King, and no court appears to have been constituted under it, and in the act of 1699 re-establishing the courts of the Province no provision is made for such a tribunal.

By subsequent acts, limited chancery powers were delegated to the common law courts, such as chancering the penalties of bonds, rendering conditional judgments in suits upon mortgages, and decreeing redemption of mortgaged estates upon the tender or performance of conditions within three years after entry made for the purposes of foreclosure.

These were, substantially, all the provisions which related to the exercise of chancery powers by these courts under the Province charter.

It is not easy to understand why a court with chancery powers should have encountered so much opposition in this Commonwealth. Under the colony charter when the people, in fact, held the reins of government, there was always a court with plenary equity powers. So when a legislature, elected by the people, under the new charter, undertook to organize a judicial system for the administration of justice, such a court was among the first to be established. It was the jealousy of the crown, and not of the people that defeated this part of the system.

Since the Revolution, the popular prejudice has been decidedly opposed to courts of chancery, and the people have been made to fear what the King did not dare to tolerate.

We might find, however, in the course of the subsequent history of our courts that of late, a more liberal spirit has been prevailing, and the people have begun to understand the advantages which might reasonably be an-

ticipated from the introduction of a rational system of equity.

Courts of Common Pleas. Until the act of 1692, it seems that the county courts as established in 1686, continued to exercise jurisdiction. But by the latter act, courts of Common Pleas were created in each county, to be held by four judges specially appointed, three of whom were competent to hold terms of the courts.

Their jurisdiction extended to all civil actions, triable at common law, either party having a right to appeal to the Superior Court, or the "party cast" might review his cause in the same court, and, if aggrieved by the judgment, might carry the case into the Superior Court by a writ of error. Appeals lay to this court from the judgments of justices of the peace in civil actions.

The act of 1699, re-established this court upon the same basis, and with the same powers as that of 1692, except that no action under the value of forty shillings could be originally commenced in a Court of Common Pleas, unless the question to be tried involved the title to real estate.

The process of the court consisted of writs of summons, capias or attachment, and ran into any county in the Province. These were to be served at least fourteen days before the sitting of the court to which they were made returnable.

By the act of 1701, these courts were authorized to establish rules of practice, and to appoint their own clerks in the same manner as the Superior Court was authorized to do.

The terms of these courts were coincident with those of the Quarter Sessions, which were courts of criminal jurisdiction, but they never exercised any but civil jurisdiction, nor was there any change or modification of their

powers from those already mentioned, during the continuance of the Province charter.

Although the act creating these courts contemplated the appointment of permanent judges in each county, the instances of appointments of special justices to act in the place of the established ones were too frequent to admit of being enumerated in this place. Indeed, in most of the counties there appears to have been special justices of this court who held their offices from year to year as if the office had been a permanent one.[1]

Quarter and General Sessions. The act of 1692, separated the powers which had been exercised by the County Courts under the colony charter, giving the jurisdiction over civil causes to the Courts of Common Pleas and creating a court of criminal jurisdiction under the style of the Quarter Sessions.

This court was to be held quarterly "by the Justices of the Peace of the same county."

The style of the court was altered in the act of 1699, to that of "General Sessions of the peace," and was to be held by the justices of the peace of the same county, or so many of them as should be limited in their commissions.

The jurisdiction of these courts was partly criminal and partly civil. As a criminal tribunal they could hear and determine all matters relating to the conservation of the Peace and the punishment of offenders, and trials were had by juries.

[1] We might infer from the following extract from "Douglas' Summary," that the Court of Common Pleas did not hold a high rank among the Provincial courts. "This court seems to be of no great consequence, and generally serves without much pleadings only to transmit it to the Superior or Provincial Court, perhaps the most upright of any in our national plantations or colonies." He adds, "The smallness of court fees multiply lawsuits and is a snare for poor people to become litigious." (1st V. 517.)

They had appellate jurisdiction over criminal matters which had been tried by a single magistrate, and from the judgment of these courts, appeals lay to the next court of assize.

Like other courts, they were authorized to appoint their own clerks and establish rules of practice.

In their civil capacity, they had charge of the financial concerns of their respective counties, superintended and controlled the management of houses of correction, granted licenses to innholders and retailers, at least after 1698, and, from a period as early as 1693, located and established high ways in their several counties.

In short, these courts had the charge of the prudential affairs of the several counties, and a general jurisdiction in all criminal matters, the punishment of which did not extend to life, member or banishment.

No essential change in the constitution or powers of these courts took place after their first creation under the act of 1699, as long as the Province charter continued in force.

Justices of the Peace. The act of 1692, gave Justices of the Peace judicial powers "in all manner of debts, trespasses and other matters not exceeding forty shillings in value, wherein the title of land was not concerned.

These powers were only of a civil nature, and to carry them into effect they were authorized to issue processes against defendants which were required to be served at least seven days before the time of holding their courts.

If the defendant neglected to appear, the justice who issued the process, might issue a warrant for the contempt, and inflict a fine upon the "*contemner*" not exceeding ten shillings.

They were authorized to issue executions and warrants of distress upon their judgments, unless appealed from.

But appeals lay from their judgments to the Courts of Common Pleas.

An act was passed in 1697, re-enacting, substantially, the provisions of that of 1692, so far as the civil jurisdiction of Justices of the Peace extended.

The criminal jurisdiction of these officers was conferred by several successive acts, the first of which was passed in 1692, of a different date from the one already referred to. By this act they were authorized to arrest all breakers of the peace, and to punish all breaches of the peace by one person striking or smiting another, by binding over such offenders, or inflicting fines not exceeding twenty shillings. They might also inquire into cases of forcible entry and detainer, and "make out hue and cries after run-away servants, thieves and other criminals."

Among other powers delegated to Justices of the Peace was that of punishing "lying, libelling and spreading false news to the injury of any one" by fine not exceeding twenty shillings, or binding over such offenders for their good behavior. And if such offender was unable to pay such fine, he was to be set in the stocks or whipped *at the discretion of* the Justice.

An act of 1693, authorized Justices of the Peace to punish breakers of the peace, profaners of the Sabbath, unlawful gamesters, drunkards and profane swearers and cursers, "by setting in the stocks, or putting in the *cage*, not exceeding three hours, or imprisonment twenty four hours, or by whipping not exceeding ten stripes, where the offender had not wherewith to pay a fine."

The act of 1699, gave to two Justices, *Quorum unus*, authority to send to the work house, all persons who lived idly or disorderly or misspent their time, or went about begging.

In 1770, an act gave to Justices of the Peace and courts

of sessions, authority to commit the class of offenders last mentioned to the House of Correction, or of otherwise punishing them by setting them in the stocks not exceeding three hours, or by whipping not exceeding ten stripes at the discretion of the magistrate.

It will be perceived by this sketch that the civil and criminal powers of Justices of the Peace, under the Province charter, were in general terms, similar to those under the constitution.

The progress of reform has softened down the cruel features of the code of punishments which were in force until recently, in the Commonwealth, but our judicial system now in force is derived in a great measure from the system that grew up before the Revolution.

Courts of Admiralty. Under the colony charter by an act of 1673, Admiralty Powers were given to the Assistants who were authorized to hear and try cases without a Jury. (Prov. Law, 721.)

The Province charter reserved to the crown the power of establishing courts of Admiralty, and the authority of granting commissions to the officers of such courts.

No court of this kind was created in the Province until 1694, and in the meantime the Governor, Phipps, exercised whatever admiralty jurisdiction there was. Upon a representation to the King in regard to the manner in which the Governor performed this part of his duties, a court of Vice Admiralty was created consisting of one Judge, a King's Advocate, a Register and a Marshal.

The commissions of these officers were either under the broad seal, or by warrant from the Lord High Admiral, but were in fact granted by the Lords commissioners of Admiralty in England. The jurisdiction of the court extended to all breaches of the acts of trade, with a single ex-

ception, and the forms of proceeding were after the manner of "Doctors Commons" in London.

Trials in this court were not by juries, and in the absence of express acts of Parliament, the Civil and Maritime law was adopted as the rule for determining questions.

Appeals lay from the judgments of this court to the court of delegates in England.

Until 1769, the officers of this court did not receive any stated salaries, but were paid by the fees of their offices.

Besides the court of Vice Admiralty, already spoken of, there was what Douglas calls a "Justiciary Court of Admiralty," which convened as occasion required for the trial of Piracies and other offences upon the high seas.

In Massachusetts this court generally consisted of the Governor, the Council, the Judge of Vice Admiralty, the Captain of the King's station ships of war, the Surveyor of customs for the northern district, and the Collector of customs for the Port of Boston.

At other times it was constituted by a special commission for the purpose.

Thus in 1723, a court assembled at Newport for the trial of pirates, and consisted of William Dummer, President, Samuel Cranston, Nathaniel Paine, Addington Davenport, Thomas Fitch, Spencer Phipps, John Menzies and Thomas Lechmere.

A similar court convened at Fanueil Hall for the trial of pirates in 1746, of which Governor Shirley was President.

In 1769, there were two trials for piracy in Boston at which the court consisted of Governor Burnett, Samuel Hood, Commodore of the ships on this station, Lieutenant Governor Hutchinson, Judge Auchmuty of the Admiralty

Court, Andrew Oliver, Secretary of the Province, Robert Trail, Collector of the Port of Portsmouth and John Nutting, Collector of the Port of Salem.

The prisoners in the cases last mentioned, claimed the right of being tried by jury, but the court refused the application, and in one case the prisoner was acquitted, and in the other he was discharged as the court were divided, four being in favor and four against convicting him.[1]

The territory over which the Judges of Admiralty exercised jurisdiction varied from time to time according to the extent of their several commissions.

The English Colonies were divided into districts over which judges of Admiralty were appointed, and these judges had the power of substitution or appointing deputies to act under them. At first, the northern district embraced New York, Massachusetts, Connecticut, Rhode Island and New Hampshire, and New Jersey was afterwards added to the district.

Soon after this, a division seems to have been made in it, whereby New York and New Jersey were separated from the other Provinces, which continued to form the

[1] A spirited sketch of this trial is given by the late President Adams, and preserved in Morse's History of the Revolution. The charge of piracy and murder was made against four seamen of Marblehead for resisting a press gang from the Rose Frigate, sent to impress them. In the encounter one man was killed. The prisoners pleaded to the jurisdiction of the court and claimed a trial by Jury. Adams was of counsel for them. The pleas were overruled and the trial proceeded until all the evidence was given in. The prisoners' counsel was about addressing the court when Hutchinson moved for an adjournment of the court to the Council Chamber. The court adjourned and held a secret meeting there. The next day when the prisoners appeared and their counsel was about to proceed, the court without waiting to hear an argument, pronounced judgment in favor of the prisoners on the ground that they had only committed a justifiable homicide. The whole proceedings and reasons for the judgment are represented as involved in mystery which was never solved.

"Northern District" for many years, if not until the Revolution.

A change in the organization of the Courts of Admiralty seems to have been contemplated and partly carried into effect in 1764. In June of that year Dr. William Spry was appointed by letters patent, Judge of his majesty's court of Vice Admiralty over all America. He arrived with his family at Halifax in September of that year, and issued his proclamation fixing certain days for holding his court there in each month, "when and where all causes civil and maritime arising in any province of America may be prosecuted."

The year following this proclamation, he made arrangements for removing from Halifax to Boston, to enter upon his duties there as Supreme Judge of Vice Admiralty, but I do not find that he carried this design into effect. In December 1767, he was commissioned as Governor of Barbadoes, and sailed for that island in January 1768, where he died about October 1772.[1] (Bos. Ev. Post.)

Whenever vacancies existed in the offices of the court of Admiralty, the Governor exercised the authority of appointing to the place until the vacancy could be supplied by a new appointment by the Lords commissioners.

The first Judge of Admiralty whose appointment I have ascertained was WAIT WINTHROP, and of him I shall have occasion to speak more at large in connexion with the Superior Court of which he was afterwards a member.

He was commissioned as Judge of Admiralty in 1699, and New York, Massachusetts, Connecticut, Rhode Island and New Hampshire were within his jurisdiction.[2]

[1] His wife, who was the niece of the Earl of Chatham and Littleton, died in Barbadoes, Oct. 3, 1769, aged 38.

[2] It is stated in the epitaph of John Phillips of Charlestown, that he was at one time a Judge of Admiralty. But see the notice of Mr. Phillips in connex-

He was succeeded by WILLIAM ATWOOD, October 28, 1701, whose commission embraced the Jerseys in addition to the Provinces already mentioned, and these constituted the Northern District of customs.[1] He appointed Thomas Newton Deputy Judge in 1701, who continued to hold the place until 1707-8, when he is spoken of by Dr. Mather in a letter to Governor Dudley as a "Judge in the Admiralty."

In April 1703, ROGER MOMPESSON, was appointed judge of the Northern District. The district however was divided as early as December of the same year, and Massachusetts, New Hampshire and Rhode Island, were embraced in a new commission to Judge Byfield. Mompesson resided in New York and continued to be Judge of Admiralty of that Province till his death, which took place January 2, 1714-15. He was a Barrister and is said to have been the best lawyer in America. At the time of his death he was a member of the executive council of New York and Chief Justice of the Superior Court of that Province. His death was greatly lamented. (News Letter.)

NATHANIEL BYFIELD, was appointed to the Northern District in December 1703, and held the office until 1715, when he was superceded by John Menzies. Judge Byfield had been made Deputy Judge as early as June 1699.

JUDGE MENZIES brought his commission with him when he came to Massachusetts, and arrived here in the ship Samuel, December 24, 1715, and entered upon the duties of his office in March following.

He was a native of Scotland, and a member of the Fac-

ion with the Court Common Pleas of Middlesex, of which he was the Chief Justice.

[1] New Jersey was probably included in the same district with New York, in consequence of having been united with the latter Province as one government under Lord Cornbury, in 1702.

ulty of Advocates there. He, at first, settled in Roxbury, but soon removed to Leicester, where he lived for many years, being an early proprietor of that township. In 1721, and several successive years he represented that town in the General Court, and in 1726, was arraigned before that body for having written home letters to the Lords Commissioners complaining of the manner in which the courts of the Province had interfered with his jurisdiction by granting prohibitions to stop proceedings in his court, and stating that it was impossible to get a jury in the country who would do justice to the King in trials which involved the rights or authority of the crown. Instead of denying or qualifying these charges, the Judge insisted they were true and that he had done no more than his duty required, and therefore declined making any apology to the House. In consequence of this he was expelled from that body. (Felt's Sal. 383-4.)

He died at Boston September 20th, 1728, in the 78th year of his age. (News Letter.)

It is stated by Douglas that upon the death of Judge Menzies, Robert Auchmuty was appointed Judge of Admiralty, pro tempore, by Governor Burnett.

This could have been for a short period only, for Judge Byfield was very soon appointed to the office, and was commissioned, November 25, 1728, although he did not receive his commission until April 10, 1729. He took the oaths of office for Massachusetts at Salem on the 10th of April, and at Newport for Rhode Island, on the 8th of May, of that year. His commission embraced Massachusetts, Rhode Island and New Hampshire.

He appointed NATHANIEL HUBBARD, afterwards a Judge of the Superior Court, his deputy for the county of Bristol, the Province of Rhode Island, the "Narraganset country"

and the "King's Province," who took the oaths of office at the same time with Byfield.

NATHANIEL BYFIELD was born in England in 1653, and was the son of Richard Byfield, one of the clergymen who constituted the famous Wesminster assembly of divines. His mother was a sister of bishop Juxon, and he was the youngest of a family of twenty-one children.

He arrived at Boston in 1674, where he resided until he became a proprietor of the town of Bristol, then within the limits of the Plymouth colony, at its incorporation in 1680. About that time he removed to that town, where he settled upon and became the proprietor of the beautiful peninsula of Poppysquash. Although educated as a merchant, and possessed of a considerable fortune, he engaged in the practice of the law after removing to Bristol, and upon the divison of the Plymouth colony into counties, in 1685, he was made chief justice of the court of common pleas for the county of Bristol. One of his associates upon the bench was the famous warrior Church, with whose exploits against the Indians, our early histories have rendered every one familiar.

Upon the union of the Massachusetts and Plymouth colonies under the charter of 1692, although Colonel Byfield continued to hold his place upon the bench of the common pleas, he entered with much spirit into the politics of the day, and in 1693, having been chosen to represent Bristol in the general court, he was made speaker of the house of representatives.

A court of admiralty was early organized, and at first embraced New York, Connecticut, Rhode Island, Massachusetts and New Hampshire, which, together, constituted one district. The judge of this district appointed his deputies for particular portions of the territory, and in

1699 Colonel Byfield was made a deputy judge of this court.

In 1703 a division of this district was effected, and a commission to Colonel Byfield, as judge of the "northern district," consisting of Massachusetts, Rhode Island, and New Hampshire, was received by him. This office he held until 1715, when, as it would seem, on account of his political opinions, he was superseded in his place upon the admiralty bench. In the year 1702 he was made judge of probate for the county of Bristol, and held the office till 1710.

The vicissitudes of political favor at length restored him to the place in the court of admiralty, from which he had been ejected, and he was again commissioned as judge, in 1729. He continued to hold this office from that time until his death. As he still held his office upon the bench of the common pleas, it will be perceived, that for many years he was judge of probate, of the common pleas, and of admiralty, at the same time. And, as will be remarked hereafter, he was, during all this time, actively engaged in political life, holding political offices, and embroiled in all the excitements of a bitter political warfare.

In 1731 he removed from Bristol to Boston, and upon the accession of governor Belcher, with whom he was connected by family, he was appointed to the place of chief justice of the court of common pleas for the county of Suffolk, having for one of his associates the distinguished Elisha Cooke, the younger of the two who bore that name.

Although not constantly a member of the court of common pleas while he resided in the county of Bristol, it is said he held the office of chief justice of that court for thirty-eight years, the last period of his office having been from 1716 to 1725. He remained upon the bench of

Suffolk county until his death, which took place in 1733, at the advanced age of eighty.

Although it is not easy to conceive how, among his other avocations and engagements, he could have qualified himself as a lawyer, to fill the places which he occupied, yet, it would seem from the character of Mompesson, whom he succeeded, and Menzies, by whom he was superseded, that legal acquirements were regarded in making appointments to the bench of the admiralty court. How much politics or family influence[1] had to do with his numerous appointments, it is difficult to determine, but it was true that he was quite as distinguished a politician as a judge.

He seems to have possessed an inordinate share of ambition, and more perseverance than prudence. His first election to the house of representatives has been mentioned. In the years 1696, 7, and 8, he represented Boston in that body, and in the last of these years was again chosen speaker.

He became a zealous supporter of that party which embraced the democracy of the province, at the head of which were the Cookes, the father and son, the latter of whom has already been mentioned.

While the leaders of this party aimed only to secure the rights of the people, Byfield sought by means of it to obtain office and accomplish his purposes of revenge upon his personal and political enemies.

He was for many years a member of the council, and, although at the accession of Governor Dudley he seems to have been his friend, in consequence of a harsh and severe reproof from the governor in open council, on account of some judicial proceedings, he conceived a most implacable

[1] He is stated by Hutchinson to have been father-in-law to lieutenant governor Tailer.

hatred towards him, which he carried so far as to attempt to supplant him in his office.

For this purpose he visited England in 1714, and an amusing account of this is given by the distinguished Jeremy Dummer, in a letter to Dr. Colman. "I had your letter by Colonel Byfield, for which and fo rall other letters and favors I thank you. The second time that gentleman and I met was at my chambers, where we soon came to a full understanding of each other with respect to the present governor. I told him that both my duty and inclination bid me to stand by his commission, with what friends and interest I could make; and he replied that by the help of God, he would get him turned out, and therein please God and all men. Accordingly we have both been pretty diligent, but I think he is now out of breath. His age makes him impatient of the fatigues of application, and his frugality makes him sick of coach hire, fees to officers, and door keepers and other expenses, so that I believe he now heartily wishes himself safe in his own government at Poppysquash. He is really an honest worthy man, but he is so excessively hot against Colonel Dudley that he cannot use any body civilly that is for him."

Although Dudley was unable to retain his office, Byfield met with but little success in his endeavors to obtain the place, and sorely to his displeasure, colonel Shute was appointed as Dudley's successor, in the place of colonel Burgess, who, though appointed, never came to Massachusetts.

Colonel Shute found the state of party feeling highly exasperated in the province, and did little to allay it. Indeed there is scarcely a period in the history of Massachusetts when the violence of party spirit was greater than during the administration of Governor Shute. The year 1720 was distinguished for the height to which these dis-

sensions rose. Byfield having returned from England was chosen to the council that year, and his election was negatived by the governor. He was again chosen, and again negatived in the two following years. Nor did he find any more favor in 1723, when the government was left in the hands of Lieutenant Governor Dummer. From that period, however, he was permitted to take his seat at the council board until 1729, when his name was omitted by the house from the list of counsellors. This seems to have closed his career of politics. And one can scarcely refrain from remarking how little of personal satisfaction or lasting honor is to be gained in such a career. He partook deeply in all the agitations and conflicts of the day, and devoted to the success of his party those powers which otherwise directed, might have made him a happier and far more useful man.

Like other political managers, he encountered much obloquy and bitterness of reproach. He excited the jealousy of Cotton Mather, and was an object of personal hatred and abuse from Jeremy Dummer, the agent of the province, at London. One extract has already been given from the correspondence of this gentleman, and another will justify the correctness of the above remark. "What Colonel Byfield says of me as well as of sir William Ashurst is false, and I can assure you I found him out in a good many lies whilst he was here, notwithstanding he was nauseously boasting of his honesty."

One thing in the character of judge Byfield ought not to be omitted, as it indicated a more enlarged and liberal spirit than was generally prevalent in the province at that time, and that is his consistent and uniform opposition to the spirit of fanaticism which displayed itself in the trials and punishment of the unhappy victims of the witchcraft delusion.

In his pecuniary affairs he was frugal to parsimony; and though his talents were respectable, they were not of that commanding character that made him a prominent leader among his political associates.

Of commanding person, imposing manners, an ardent temperament and an enterprising disposition, he is said to have preserved a large share of public respect through his long and diversified life. Little, however, is preserved of him as a politician, and far less is known of him as a judge.

Robert Auchmuty was appointed to succeed Judge Byfield in the Admiralty, and his commission embraced Massachusetts, New Hampshire and Rhode Island. Shirley, afterwards Governor, was appointed at the same time Judge Advocate of the same court.

Judge Auchmuty held the office until 1747, when he was superseded by Chambers Russell.

He was an eminent Barrister, but when he was admitted to practice does not appear. He was in pratice soon after 1719, and the profession owed much to his character and efforts for the elevated stand it was beginning to assume, and the system and order which now began to distinguish its forms of practice.

Among other public offices with which he was honored he was one of the Directors of the Land Bank, was appointed from time to time to act as Attorney General in the absence of that officer, and also during the vacancy occasioned by the death of Mr. Overing.

He was sent to England in 1741 to settle the dispute between this Province and that of Rhode Island relative to the boundary line between them. He resided at his seat in Roxbury.

It was while he was in England, that he is said to have conceived and matured the plan of the expedition against

Cape Breton and Louisburg which crowned the Provincial troops with so much glory and renown.

He died April, 1750. Mr. Bollan, so long the agent of the Province in London, studied his profession under Mr. Auchmuty's tuition.

His daughter married the distinguished Judge Pratt of New York, and of his two sons, Samuel was a minister in New York, and Robert became an eminent lawyer in Massachusetts, and was for many years Judge of Admiralty in that Province.

CHAMBERS RUSSELL was appointed in the place of the elder Auchmuty as a judge of Admiralty, for Massachusetts, New Hampshire and Rhode Island in 1747. He held this office until his death in 1767. As he was a member of the Superior Court he will be noticed in connexion with that court.

During his administration, GEORGE CRADOCK acted as Deputy Judge. He resigned that place in1766 on account of his great age and infirmities of body, and died July 1, 1771, aged 87 years.

Upon the resignation of Judge Cradock, the office was given to WILLIAM REED, in July 1766. He was afterwards appointed Judge of the Superior Court, and will be again noticed in another part of this work.

Upon the death of Mr. Russell, ROBERT AUCHMUTY, the younger, was appointed to his place, by the Governor. This was in April, but on the 6th July 1767, he was duly commissioned as Judge of Admiralty for all New England with a salary of £300 a year. Previous to this time the compensation of that officer had been by a percentage (usually five) upon all condemnations, and had not generally amounted to more than £100 per annum.

His commission was renewed in March 1769, when his

salary was increased to £600 per annum.[1] He continued to hold the office as long as the authority of the British Crown was recognized, and being a zealous loyalist he left the country in 1776 for England. Previous to leaving the country his place of residence was in Roxbury.

Although he had not the advantages of a collegiate education, he became an able and eminent lawyer. As an advocate he was eloquent and successful. Among his cotemporaries were Otis, Quincy and Hawley, and Judges Paine, Sargent, Bradbury, D. Sewall, W. Cushing and Sullivan, and though less learned than some of these, he was employed in most of the important Jury trials.

It was to him, together with that class of lawyers above named, that the profession owed the respectability which since his day has characterised the Bar of Massachusetts.

He held the office of Advocate of the Court of Admiralty from August 2, 1762, till his appointment as Judge, having been originally appointed in the place of Mr. Bollan, to hold the office during his absence.

It is to be regretted that of men as distinguished in their day as were the Auchmuty's, father and son, so few memorials now remain. They will however be found to have possessed a large share of the public confidence, and to have left a decided impress of their characters upon the profession which they adorned.

There was a Court of Admiralty continued during the Revolution, but its history belongs to a more recent period than is embraced in these sketches.

Although the list of Advocates General of the Admiralty Court which I have discovered may not be found complete, I am able to give the following names as among their number.

[1] In 1773 Thomas Oliver, afterwards Lt. Governor of Massachusetts was appointed Judge of Admiralty for the Province of New Hampshire.

Benjamin Lynde was appointed in 1697, for Massachusetts, Connecticut and Rhode Island. As he afterwards became a Judge of the Superior Court, there is no occasion to notice him further here.

John Valentine of Boston, held the office at the time of his death in 1724, and may have been the immediate successor of Mr. Lynde. He was a lawyer of distinguished learning and integrity. An argument of his in the case of Matson vs. Thomas, in which he was opposed by Auchmuty, Reed and Isaac Littles, is preserved, in which he manifested great familiarity with legal principles as well as ability as an advocate. He is said also to have been "an agreeable and expressive speaker."

Wm. Shirley was appointed to this place in 1733, and held it until he was made Governor of the Province in 1741.

William Bollan who was son-in-law of Governor Shirley, succeeded him as Advocate General. He went to England as agent of the Province in 1745, and Mr. Auchmuty was appointed to his place in the Admiralty Court during his absence.

The next man we find in possession of the place was James Otis, Jr., who resigned it in 1761 rather than compromit his sense of duty to his country in advocating the issuing of "writs of Assistance."

Robert Auchmuty was the successor of Mr. Otis, and held the office till his appointment as Judge of Admiralty in 1767.

Jonathan Sewall came into the office on Judge Auchmuty's being promoted to the Bench, and was followed by Samuel Fitch about 1770. Mr. Fitch held this office till the Revolution.[1]

[1] There was a body of "Commissioners of the Customs," who exercised powers somewhat like those of the Court of Admiralty for a few years before the Revolution. Among other officers connected with this commission was a

PROBATE COURT. Except during the administration of Andros, Probate jurisdiction had been exercised by courts of common law previous to the charter of 1691. By that charter the jurisdiction in regard to probate affairs was conferred on the Governor and council.

The Governor and council, however, by the right of substitution which they possessed as a civil law court, exercised their judicial powers in probate matters by County courts from whose decisions, appeals lay to the Governor and council as the Supreme Court of Probate. For this purpose they created Judges of Probate in each county. And when the legislature undertook to exercise the power of creating similar courts, the King negatived the act, so that no law, in fact, existed under the Province charter for the appointment either of Judges or Registers of Probate.

The organization and powers of this court were the subject of a learned and interesting communication by Governor Pownal in 1760 to the council then sitting as the Supreme Court of Probate. He states that the court then existed without a seal, that it kept no records, had no rules, and did not observe even the common formalities of a judicial court. He traces the appointment of judges in the several counties to the power of substitution which the Governor and council possessed as a civil law court.

It was probably owing to this recommendation contained in the communication, that registers were appointed and seals adopted by these courts.

Very little can be said of the regularity of their proceedings previous to the revolution, nor were there any changes in their organization during the existence of the charter, which deserve notice. (Suffolk Records, White's Dig.)

"Solicitor General!" David Lisle, held this office from 1769 to his death in February 1775. Daniel Leonard of Taunton became his successor and held the office till the authority of the Board was at an end.

CHAPTER X.

Civil and Criminal Process in the Province—state of the Courts and Bar before the Revolution.

In order to present any thing like a complete sketch of the history of our judicial system, it would be necessary to trace among other things the changes that were made in the practice and forms of proceedings in courts, and to ascertain to whose influence is to be ascribed the progress of improvement that was made from time to time in the administration of justice.

Something may be done by resorting to the records of courts to define the state of judicial proceedings at different periods of our history. But to whom we owe the one improvement or another is not easily determined. Towards the close of the provincial government, as I shall have occasion to remark, there arose a class of eminent men who left upon the age itself an impress of their own minds. Nor was this more manifestly distinguishable in any departments of the government than in that which was connected with the administration of justice. There were learned men and noble spirits in the profession then, whose influence elevated and dignified its character, but the progress of change in the course of legal proceedings was slow and almost imperceptible.

The forms of writs were adopted soon after the adoption of the charter. But the forms of action, and especially the

forms of declarations upon different causes of action, were unsettled until a much later period.

No rules of practice were established by the courts under the charter. Perhaps the reason of this may be found in the fact that with the exception of Lynde, Dudley, Trowbridge and William Cushing, there was not an educated lawyer upon the bench of the Superior Court during all that period.

Attorneys at law were recognized as officers of the courts, and by the law of 1701, an oath of office was required of them upon being admitted to practice.

The distinction of rank between Barristers and mere Attorneys was maintained. But no specific term of study was required by the courts as a pre-requisite to an admission to the bar. The custom of requiring a term of three years study was adopted just before the revolution upon the recommendation of the bar of Essex.

No party could by law, employ more than two lawyers to aid him in the management of his cause, and at the same time no attorney at law could refuse to aid a litigant who should tender him a fee of twelve shillings. Every attorney produced his power in each case in which he was engaged, and to guard clients from loss, it was enacted that if an action failed from any error in the writ, the attorney was bound to make a new one without fee.

For many years after the new organization of the government, the course of practice seems to have been extremely sharp and captious in the courts. What little of special pleading was known, was turned into a mere tool of trick and artifice in the hands of pettifogging attorneys.

Pleas in abatement were very frequent, and special demurrers for trifling errors and defects were in use in all the courts. Special pleading however, was far from being understood as a system. Indeed the profession, instead of

regarding law as a science, made use of it as a mere trade in which trick and cunning took the place of learning and fair dealing.

An incident related by Willis in his valuable history of Portland, will serve to illustrate the period of which we are speaking. In the Court of Common Pleas between 1720 and 30, Shirley (afterwards Governor,) filed a special plea in an action of trespass. The plaintiff's counsel was obliged to reply *ore tenus*, and the cause went on "some how or other" as the writer states, though no one seems to understand the manner in which the proceedings were completed.

In the account which Dummer gives of the courts in Massachusetts about 1721, it is stated that declarations then formed a part of the writ, and where book accounts were sued, a copy of the account was annexed to the writ. The time required for the service of writs before their return was at least fourteen days. Special pleadings gave place in all cases to the general issue, and so little regard was paid to the forms of action that *case* continued to be the action for the recovery of lands, whether the demandant's title was conditional or absolute.[1]

Towards the latter part of the period of which I have been speaking, the forms of pleading and practice became generally as correct as they have ever since been. A more liberal system took the place of the quibbles and chicane of an earlier day. The character of the legal profession tended to raise the character of the bench itself,

[1] I find the following action mentioned in the Boston Evening Post, Taunton March 11, 1773. Nehemiah Liscomb vs. Jerathmeel Bowers, to recover one hundred gallons of Jamaica rum won on a wager. The verdict was for the defendant and the plaintiff appealed. This is said to be the first action for a wager ever brought in the Province.

and gave to the business of administering justice a higher degree of respectability than it had before obtained.

The character of the early period of the provincial administration, cannot perhaps be presented in a stronger manner than by an extract from the work of Dr. Douglas, who wrote about 1746, when low salaries, cheap litigation, a feeble court and an uneducated bar had produced the effect which such a state of things always must create. "Generally in all our colonies, particularly New England, people are much addicted to quirks of the law. A very ordinary countryman in New England is almost qualified for a country attorney in England."

From such a state of things as this, the advance must have been slow, and it was only by the influence of a succession of able and learned men that a reform was effected. Lynde, Paul Dudley, Read, Gridley, the Auchmutys and Trowbridge were among those to whom the administration of justice was indebted for many of its decided improvements.

There were many causes, some of which have already been alluded to, which conspired to repress the influence of courts of justice in the Province. For many years, next to none of the practitioners at the bar were educated men. Judge Lynde came upon the bench in 1712 and was the first lawyer who had ever held that office. The clergy too continued for many years to exercise a control over the civil departments of the government, and to interfere occasionally, directly with the administration of justice.

An instance illustrative of this kind of clerical interference is taken from the autobiography of the Rev. John Barnard who was for a long time a clergyman in Marblehead, having been settled there in 1715.

While there, an action of slander was brought by a cler-

gyman against a layman for words which he had spoken of him. At the request of Cotton Mather, Mr. Barnard and a Mr. Webb, another clergyman, attended the trial at Salem. Mr. Barnard dined with the court and told the judges, that when that case came on, he had something to offer with their leave. They agreed to notify him of the trial and of the proper time to speak.

The case was called, the plaintiff's attorney made his opening statement. Thereupon Mr. Barnard asked permission to put certain interrogatories *to the plaintiff*, which he did, and the plaintiff answered them. The trial proceeded, and the defendant's attorney closed "with many fleers upon the ministry and our churches." The Chief Justice then told Mr Barnard that it was then a good time if he wished to offer any thing, whereupon he "paid his respects to the court and delivered his speech," and concluded by wishing the court to dismiss the action. Mr. Webb said he "joined in my sentiments and request." "The judges immediately threw the action out of court, being glad as they expressed it to get rid of so dirty an affair."

As an offset to this interference of the clergy in the administration of justice, I would refer to the case of the Rev. Mr. Breck who was about to be settled in Springfield in November 1735. He had been regularly "called," and the council had convened to ordain him, and were actually examining him, when some reports unfavorable to his *orthodoxy* having reached the ears of John Stoddard, Ebenezer Pomeroy and Timothy Dwight, three of the Justices of the Peace in that county, they issued their warrant against him upon which he was arrested, taken from the ecclesiastical council and brought before the examining justices and made to "answer upon matters of doctrine and faith" before them—they being the same

matters in regard to which the council were inquiring at the time of the arrest.

As Mr. Breck had resided in Connecticut, the justices thought best to send him to Windsor in that state, where they caused him to be bound over to answer before the court of Windham county.

The church and society in Springfield not relishing this interference, applied to the legislature for relief. The House after considering the matter came to the conclusion that although the justices had a right by law to inquire into the facts charged against Mr. Breck, yet they ought not to have interrupted the ecclesiastical council while they were in the exercise of their just right in inquiring into the same.

Here the matter seems to have rested, for Mr. Breck was soon after settled over the same church without opposition.[1]

As the penal code of a state is often regarded as a kind of criterion by which to determine the degree of refinement of public feeling there, it may be proper to mention the following as a mode of punishment adopted in 1735. The defendant was indicted for forging a bond, but the evidence not proving the fact fully, he was convicted of being a *cheat*, and the punishment inflicted was to wear the forged bond and a square piece of paper fixed to his breast with the word "*cheat*" written in capital letters, and to stand on the steps of the court house for half an

1 I find from Mr. Felt's annals of Salem, that Judge Lynde, then a member of the council, was upon a committee in 1731, "to consider a printed sermon said to be preached at Southboro', December 21, by John Greenwood, pastor of a church at Rehoboth, at the ordination of Nathan Stone pastor of the church at Southboro', which the House apprehend may have a tendency to subvert the good order of the churches and towns within this Province."

hour between twelve and one o'clock. And this sentence was accordingly executed.

In criminal matters however,[1] the common law was in a great measure retained, even to the benefit of clergy. The last instance of this, that I have discovered, was the case of James Bell in March 1773. He was convicted of manslaughter in the Superior Court in Boston, where he pleaded the benefit of clergy and was accordingly burned in the hand and discharged.[2]

Before leaving the subject of practice, it may not be misplaced to insert the following account of the case of James Otis against Robinson, for an aggravated assault and battery which it may be remembered was cowardly inflicted upon him in the British Coffee House in Boston by the defendant, one of the commissioners of customs. The action was tried in 1770. The damages were laid at £3000, and the jury returned a verdict for £2000. In the account of this trial, when it was approaching, given in the News Letter, it is said, "His majesty's writ of *original summons* on this occasion is very elegantly engrossed on the best gilt paper. The above writ was served according to the laws of the Province, not by holding to bail, but by leaving a transcript engrossed in the same hand and paper at the defendant's house."[3]

[1] It is stated by a writer in the Historical Collections that two negroes were executed in 1749, in Charlestown, for poisoning their master. One, Mark, was hung in irons upon a gibbet and the other (Philis) was burned. And he asks "are there any other instances of *burning* or *gibbeting* in the annals of New England?" (2 Ser. Hist. Col. ii. 166.)

[2] Many other instances might be cited where prisoners were admitted to the benefit of clergy. Thus in 1770, George White and Patrick Freeman having been convicted of burglary were burnt in the hand, having claimed the benefit of clergy.

[3] Those who are familiar with the life of Mr. Otis will recollect that he remitted to the defendant the whole amount of damages found by the jury in this

An incident occurred in regard to the courts in 1774, which may be here noticed. The disputes between the government and the people had almost reached their crisis. The crown had created a board of Mandamus counsellors, among whom were the judges of the Superior Court. Judge Oliver had moreover accepted his salary from the crown. And in view of these things the jurors in Middlesex and Worcester refused to be sworn or to act at all until they were assured that Judge Oliver would not attend court. The same year in September the Grand and Petit Jurors of Suffolk refused to be sworn because the charter had been violated by the appointment of judges, Counsellors by Mandamus. The court however went on with the ordinary business of the term without the presence of a jury.[1]

Among other writs in use during the period of the Province Charter, was that of Habeas Corpus. It seems to have been adopted at first as a common law remedy. In

case, except a sufficient sum to reimburse his expenses actually paid. I have referred to this, to show the sums charged as counsel fees at that time by the most eminent counsel in the Province.

The taxable costs of court amounted to £13 10s. 8d. Defendant was to pay these and, £30 each for the use of Samuel Fitch, John Adams and Sampson Salter Blowers, counsel retained by Mr. Otis and very diligently attending the business three years."

[1] The circumstances attending this occurrence were these. The court was holden by Oliver, Trowbridge, F. Hutchinson, Cushing and Brown. The grand ury refused to be sworn and filed their reasons in writing, four in number. 1st, Because the Chief Justice was under impeachment. 2d, Because by the law the Judges were to hold their offices during the pleasure of the King. 3d, Because three of the Judges, Oliver, Hutchinson and Brown, had taken oaths as Mandamus Counsellors. 4th, Because they could not conscientiously act with a court thus constituted. Twenty-two of the panel signed this paper.

The petit juries were then arrayed and foremen, as was the custom then, appointed by the court. But they refused to be sworn for reasons similar to those of the grand jury. The juries then withdrew and the court proceeded the next day without judge Oliver.

1689, application for such a writ was made to Judge Dudley by Mr. Wise, but the application was arbitrarily refused.

In 1706, an application was made to Chief Justice Sewall for a writ of Habeas Corpus, and although it was refused for satisfactory reasons, there is nothing to indicate that the court regarded it as a novel application. I have however found no one of a similar kind made at any earlier period of the Provincial Government. A writer in the Historical Collections suggests a query if this was not the first instance of an application for this writ in Massachusetts.

The instance of the Rev. Mr. Wise in 1689, has already been noticed, and the refusal by Judge Dudley to grant it was made the ground of a suit for damages, after the revolution in New England, which shows that the right to this writ was regarded as one of the existing privileges of the colonists.

Those who are familiar with the forms of legal proceedings in Massachusetts will recal the great number of precedents that are now in use, that were originally drawn by leading members of the bar before the revolution. Whatever books they had, were of course English books, but these were very few in number. I find Chief Justice Sewall citing Coke's Institute to justify himself for having admitted certain persons to bail. Sir Matthew Hale, had published his "Analysis of the Law," before this time, but "Wood's Institute," once a popular work and a leading authority, was not published in England until 1722. It was more than forty years after the publication of the last mentioned work, before the Commentaries of Judge Blackstone were published.[1]

[1] Perhaps the state of legal bibliography before the revolution, cannot be pre-

Mr. Holmes in his address to the Bristol bar says that the books that were to be obtained by Otis, the father of the distinguished James Otis, when he studied law, were Coke's Institutes, Brownlow's Entries and Plowden's Commentaries and Reports.

And by referring to a printed argument of Mr. Valentine in the action of Matson vs. Nathaniel Thomas in 1720, before the Superior Court, I find he cited as authorities 1 Co. Inst. 2d Do. Coke's Reports, 1 Modern Rep. Hobart's Reports and Chancery Cases.

President Quincy in his address at the dedication of "Dane Law College," gives an extract from the writings

sented in a better manner than by referring to an advertisement published in the Essex Gazette in December, 1774.

"The sages and students of the law in America now have an opportunity of seeing at most of the Booksellers' shops in the capital towns and cities on the Continent, printed proposals with conditions and specimens for printing by subscription, American Editions of the following celebrated works, by the undertaker Robert Bell, Printer and Bookseller, Philadelphia.

1. "Coke's Commentaries upon Littleton." Net the name of the author only, but of the law itself, in one large folio volume, page for page with the last London edition. At sixteen Dollars to the subscribers, although the London edition is sold at 32 Dollars.

2. "Bacon's New Abridgement of the Law" in five volumes, 4to, page for page with the last London Edition, at 20 Dollars to subscribers, although the London Edition is sold at 40 Dollars.

3. A second American Edition of Judge Blackstone's Commentaries on the laws of England, in four volumes quarto, at $3,00 each volume and the 5th volume or appendix at $2,00, the whole in neat law binding. The 4th and 5th volumes of this quarto Edition is already printed and sold at $5,00 to those gentlemen who became subscribers for the 1st, 2d and 3d volumes which are now printing at Philadelphia by said Robert Bell.

Gentlemen who are pleased to approve of these specimens and conditions by speedily giving in their names as encouragers, will peculiarly oblige the undertaker, and greatly contribute towards the elevation and enlivening of Literary manufactures in America."

The former edition of Blackstone referred to in the above advertisement was octavo and published in four volumes in 1771, 2, and 3, in Philadelphia.

of Lord Chief Justice Reeves which shows the condition of the English students as to books before the publication of Blackstone's Commentaries. "Read Wood's Institutes cursorily and for explanation of the same, Jacob's Dictionary. Next strike out what lights you can from Bohun's Institutio Legalis, and Jacob's practising Attorney, Companion, and the like, helping yourself by Indexes. Then read and consider Littleton's Tenures without notes and abridge it. Then venture on Coke's Commentaries. After reading it once read it again, for it will require many readings. Abridge it. Common place it. Make it your own, applying to it the faculties of your mind. Then read Sergeant Hawkins to throw light on Lord Coke. Then read Wood again to throw light on Sergeant Hawkins. And then read the statutes at large to throw light on Mr. Wood." If such was the process of acquiring legal knowledge in old England, no wonder so little was known of law in the provinces of New England.

I have already referred to the degree of style and imposing form which distinguished the Superior Court before the revolution. The judges of this court were enabled to maintain their standing rather by their personal influence and political connexions than any official qualifications. Whenever they went their circuits, there was a kind of royal emanation accompanying them that gave them a consequence in the eyes of the people.

They partook too in the politics of the day to a greater or less extent. Thus, for instance, when Governor Hutchinson took the oaths of office, "the Judges and gentlemen of the law" attended "in their gowns" after which the Judges of the Superior Court made a written address to him, and the bar also made an address on the occasion to which the Governor replied.

The manner of the Court towards the bar and suit-

ors was distant and severe. Courtesy between them, and even between members of the profession themselves, was measured by the rules of artificial rank, in which urbanity had little place. One cause of this was the distance, in fact, between the members of the court and the uneducated practitioners at the bar, in the early part of the history of the Province, and the still greater distance that grew up at a later period, between the leading members of the profession who were educated and those who were not. It is said by President Adams, when speaking of Trowbridge, that while he was at the bar "he commanded the practice of every county which he visited, and could crush a young lawyer by a frown or a nod." Even down to a period approaching our own times, if we may believe a remark of Fisher Ames, "a lawyer ought to come into court with a club in one hand and a speaking trumpet in the other."

The judges and the public had not learned that the true dignity of a court depends more upon the learning, talents and integrity of its members, than any robes of office or pomp of ceremony that may attract the gaze or admiration of the multitude for the passing moment.

If this remark required an illustration it might be found in the want of respect with which the judges of the Inferior Courts, during this period, were sometimes regarded by those members of the bar who knew how to appreciate their incompetency for the place of expounders of that law which they did not understand. An anecdote which is found in the address of the late venerable Mr. Holmes, before the Bristol bar in 1834, may serve as an instance of this want of respect on the part of leading members of the profession. While the distinguished "Brigadier Ruggles" was practising at the Bristol bar, at a term of the Court of Common Pleas in Plymouth, a very old woman who was

a witness in his case, told him she could stand no longer and asked him where she could sit. Ruggles looking around and seeing no vacancy except on the bench, told her, inadvertently, that she might go there. The old woman hobbled to the bench and creeping up the stairs got within the breast-work, and was sitting down, when one of the judges asked her what she was there for? She replied that Ruggles told her to come there, and take her seat. The court asked him if he sent the old lady there. Ruggles feeling above equivocation said he did. "How came you to do this?" was the next question. He began to repent, but as it was too late to retreat he must make the best of it, and looking up with a dignified smile said hesitatingly "I—I—really thought that place was made for old women." The court hesitated, but concluding on the whole that silence was the safest course, dropped the subject.

It is difficult, if not impossible, to rescue even the names of those who at one time or another were in practice as lawyers, during the continuance of the Province charter. The number of the barristers might be more easily ascertained, but as no register of the several officers in the province was published previous to that of Mein and Fleming in 1767, it is difficult to determine even the number of barristers at law at any time anterior to that date. In 1768, there were twenty-five barristers in the whole of Massachusetts which, there is reason to believe, was more than double the number of those who were in practice twenty years before that date.

Of these, ten were in Boston, viz. Richard Dana, Benjamin Kent, James Otis, Jr., Samuel Fitch, William Read, Samuel Swift, Benjamin Gridley, Samuel Quincy, Robert Auchmuty, and Andrew Cazeneau. Five were in Essex, viz. Daniel Farnham, William Pynchon, John Chipman,

Nathaniel Peaselee Sargent and John Lowell. Middlesex had but one, viz. Jonathan Sewall. Two were in Worcester, James Putnam and Abel Willard. Three were in Bristol, Samuel White, Robert Treat Paine and Daniel Leonard. Plymouth had two, viz. James Hovey and Pelham Winslow. Jonathan Adams was in Braintree, then a part of Suffolk county, and John Worthington was of Springfield, then in the county of Hampshire. Sixteen others had been made Barristers before the commencement of the revolution, viz. John Adams and Sampson Salter Blowers of Boston, Moses Bliss and Jonathan Bliss of Springfield, Joseph Hawley of Northampton, Zephaniah Leonard of Taunton, Mark Hopkins of Great Barrington, Simeon Strong of Amherst, Daniel Oliver of Hardwick, Francis Dana of Cambridge, Daniel Bliss of Concord, Joshua Upham of Brookfield, Shearjashub Bourne of Barnstable, Samuel Porter of Salem, Jeremiah D. Rogers of Littleton and Oakes Angier of Bridgewater.

Of these, thirty six were at the bar at the commencement of the Revolution. There were ten or more attorneys at that time who had not been made barristers, viz. David Gorham, Josiah Quincy, Samuel Sewall, John Sprague, Edward Pope, Rufus Chandler, Theodore Sedgwick, Timothy Langdon, Isaac Mansfield and Thomas Danforth.

Whoever is at all familiar with the general history of this commonwealth, will recognize, at once, among the names above enumerated, many who were not only able to give character to the profession they adorned, but who in fact stamped a character upon the age in which they lived. As we look back upon this period of our judicial history every one must feel that there were giants then in the land. The influence of such a bar was reflected upon the bench itself. The profession became an honor-

able and liberal pursuit. The judiciary became elevated and improved, Legislation became more free, and the people were taught their rights as Englishmen under the common law and as citizens of Massachusetts under their charter.

There was a general tendency towards freedom, although both the courts and many of the bar were decided loyalists. As early as 1770, and two years previous to the decision of Somerset's case so famous in England, the right of a master to hold a slave had been denied, by the Superior Court of Massachusetts, and upon the same grounds, substantially, as those upon which Lord Mansfield discharged Somerset, when his case came before him.

The case here alluded to was James vs. Lechmere brought by the plaintiff, a negro, against his master to recover his freedom. Jonathan Sewall was counsel for the plaintiff and Francis Dana for the defendant. The action resulted, as above stated, in favor of the plaintiff.

But it would be wandering from the proposed objects of this work, if I were to allude as I am almost irresistibly led to do, to the political influence of some of those whose names are connected with the bar of Massachusetts. Whoever has read the history of the American Revolution will associate the names of Otis and Adams and Hawley and Paine, with the achievement of American Independence, but it is chiefly as lawyers that we now have to do with them.

CHAPTER XI.

Personal Notices of the Attorneys General, Solicitors General, and some of the Barristers who practised in the Courts under the Provincial Government.

Although I may fail altogether in doing justice to the memory of the leading members of the legal profession previous to the Revolution, a work like this would be manifestly incomplete if they were passed over with no other notice than their mere names.

But before attempting a sketch of the members of the profession generally, we ought to speak more at large of those who at different periods filled the office of Attorney General in the Province.

The office of Attorney General had become an established one as early as the time of Andros. It was continued under the new charter, but a controversy arose between the Governor and Council and the House, which continued for many years, as to the appointing power to fill this office. The House contended that it lay with the General Assembly to elect the Attorney General, while the council insisted that the appointing power was in their branch. Sometimes, therefore, it will be seen, this office was filled by an election by the House, and sometimes by appointment by the Governor, just as the one party or the other prevailed in the controversy.

The first Attorney General under the new charter was ANTHONY CHECKLEY, who was appointed by the Governor and council, October 28, 1692. Checkley had been the Attorney General of the Court of Oyer and Terminer for the trial of the witches of which I have heretofore spoken. How long he continued to hold the office I have not ascertained, though I find no new appointment until 1702. In 1693, a petition was presented by him representing that there were no fees stated by law for him in that office, and praying compensation for his services, and upon this representation £60 were granted him.

A similar application was made by him in 1696, November 8th, and £50 were granted him for what he had done or might do till the next May.

He was born in 1636, and his business was that of a merchant. How early he began to practice law does not appear, but I find he was formally admitted to practice and took the oath as an attorney in July, 1686. From the number of times afterwards, in which his name appears as an attorney in the courts, it would seem that he was among the most prominent lawyers of his day.

He however continued to pursue his business of merchandize, though he seems to have lacked one pretty important qualification of a good merchant, for I find the record of a suit by Joseph Webb, who was clerk of the court, against him in 1692, to recover £9 15s. 6d. for fees due for the entries of actions. Upon the writ in this case he was arrested and gave bail for his appearance at court. He died of the small pox in October 1702. Among his offices he was a captain in the militia of the Province, and a member of the ancient and honorable artillery while yet it was a select and distinguished corps of men.

PAUL DUDLEY was appointed attorney general July 4, 1702. He was in fact commissioned to that office by

Queen Anne. Governor Dudley however never published this commission, but instead of it appointed him to the place by the consent of the council. No effort was made for some time on the part of the House to exercise the right of electing the Attorney General. In 1715, a movement was made to that end, by the House choosing a committee to notify the Council that they were about to choose an Attorney General if the Council would not concur. Three days afterwards, November 20, the House chose Thomas Newton to the office, but the Council declined acting with them.

The next year the attempt was made with better success. Colonel Tailer, the Lieutenant Governor, had become acting Governor and yielded the point. Paul Dudley, however, was the person elected. From this time until the arrival of Governor Burnett in 1728, the election was annual. But in order to be valid it was necessary that both branches should concur in a choice.

Dudley continued in the office of attorney general until his appointment to the bench of the Superior Court in 1718. He will be more particularly noticed in connexion with that court.

I have not ascertained who succeeded Dudley as Attorney General, but have reason to believe it was Thomas Newton, as he held the office at the time of his death, May 28, 1721. He was of the party in politics opposed to Governor Dudley, and his name is appended to a petition for his removal in 1706.

Mr. Newton was born in England June 10, 1660, and received his education there. He was for many years one of the principal lawyers in the Province, and sustained many responsible places of honor and trust here. He was, as I have had occasion to state in speaking of the court of Admiralty, a deputy judge of that court, and at the time

of his death was comptroller of the customs for the port of Boston as well as Attorney General. He was a gentleman of great worth and greatly beloved in the Province. His death was much lamented and his funeral was attended by the Governor, the members of the Council and many of the principal men in and around Boston. He resided in Boston and was 61 years of age at his death.

His library was advertised for sale soon after his death and is said to have been the greatest and best collection of law books which had ever been offered for sale in the country.

In 1722, the House chose John Overing—and in 1723, they chose John Read.

In 1727, John Read was again chosen.

In 1728, Governor Burnett nominated, and the Council confirmed JOHN OVERING, as Attorney General. The House chose Addington Davenport, Jr.; but the Governor resisted, and the House yielded at that time. They again renewed the struggle in 1732, and chose John Read, but the Governor, Belcher, negatived the choice on the ground that there was then an existing attorney who had been appointed agreeably to the Royal Charter and his majesty's instructions to his Governors.

In 1733, however, the Council yielded and joined the House in electing this officer.

From 1733, till 1749, the House and Council continued to elect him annually. But from 1749, till the Revolution, the Governor and Council assumed and exercised the power of appointment, although the House from time to time renewed the attempt to render him an elective officer.

The grounds upon which this memorable controversy between the Governor and House rested, are stated at large by Mr. Minot in his history of Massachusetts.

Overing was elected, after being displaced, at the elec-

tion in 1733, during the years 1739, 40, and 41, and again in 1743, and was annually re-elected until near his death which took place November 24, 1748.

Mr. Overing is represented by Dr. Elliott as having been a remarkable fluent and agreeable speaker at the bar, an able and successful lawyer, and as having acquired both fortune and influence in the Province.

Addington Davenport, Jr. was chosen Attorney General in 1728, and in 1732, but it seems doubtful if he ever was permitted to perform the duties of the office. He was a son of Judge Davenport and practised law for some years. In 1732, he went to England to take orders in the church and there received a Master's degree at Oxford. Having been ordained, he was sent by the society for propagating the gospel in foreign parts, as a missionary to Scituate, where there then were two congregational churches. Under his influence a church called that of St. Andrews, was established in that town, of which he was the first Rector.

From Scituate he removed to Boston, and became Rector of King's Chapel, which place he held three years until 1740, when he was transferred to Trinity Church, of which he was Rector till his death, September 8, 1746.

He married a sister of Dr. Chauncy's wife.

John Read was chosen to this office, by the House, in 1723, and again in 1732, but the Council in 1732, did not concur. In 1733, 4, and 5, he was again successively elected by the House and as the Council concurred he held the office during those years.

He deserves a larger space than is compatible with the design of this work, for he filled a wide sphere in the affairs of the Province, while he lived.

He was graduated at Cambridge in 1697, and after studying theology, preached awhile. He was admitted to the

bar about 1720, when he was nearly forty years of age. But he soon became eminent in the profession, and has been spoken of as "the greatest common lawyer that ever lived in New England." However just this eulogium may have been, he was a man of very superior powers of mind, and great and extensive acquirements. He did much, perhaps more than any one man, in introducing system and order into the practice of the courts of Massachusetts, and his forms of declaring in various actions, are still regarded as safe precedents by our courts.

He was, withal, exceedingly eccentric, and among other instances of it, he used to travel *incognito* into the other colonies, and occasionally would volunteer in the defence of actions, and always astonished both courts and juries by his profound learning, his captivating eloquence and his sparkling wit, which produced a more striking effect from the little indication which his garb or external appearance gave of what they ought to expect. Many anecdotes are preserved of his eccentricity and his wit, some of them while he was a preacher, and some while he was at the bar, but the space allotted to this notice will not admit of repeating them here.

He was the first lawyer who was ever chosen as a member of the General Court. He represented the town of Boston in 1738, and several successive years, and for some years before his death was a member of the Council.

He was as prominent a leader in either branch of the Legislature as he was at the bar, and the history of the times furnish many instances of the influence he exerted while in that body. Indeed he seems to have been regarded as a kind of oracle whose responses were always a safe guide.

He was moreover an author, and his name is contained in "a list of writers who were citizens of Boston" pub-

lished in the 3d vol. Hist. Collection. And to him is ascribed the authorship of a grammar and political essays. He died February 7, 1749, at an advanced age.[1]

WILLIAM BRATTLE, was chosen by the House and Council to the office of Attorney General, 1736 and 37. He belonged to Cambridge and was the son of the Rev. William Brattle. He was graduated at Cambridge in 1722. He became distinguished as well by his talents as by the various professions which he pursued at various times. He studied theology and was a popular preacher. He was also a successful practitioner of medicine. And as a lawyer his business was extensive. Nor was it in the professions alone that he shone conspicuously among his cotemporaries. He became a leading politician, and to complete his chain of titles and honors, he was made a Major General of the militia, and sustained this part of his public character with as much eclat as he did his multifarious professional duties. As a political man he was many years a member of the House of Representatives, and for sometime one of the Council, having been elected to that branch as early as 1763.

He held the office of Attorney General during the year 1736, and possibly during that of 1738, and was occasionally appointed to act in the absence of that officer.[2] But though his practice as a lawyer extended into the neighboring counties to that in which he lived, I do not find that he was ever made a barrister, and there is some reason to believe that the attainments of his Majesty's Attorney General, the Honorable, Reverend, General, Doctor Brattle, Esquire, were rather various than profound, and that the description of him given by a witty cotemporary

[1] The grammar was a Latin one, 16 mo. and was published 1736.

[2] He acted as such in September 1739, at Boston, and 1745, at Worcester.

may have had some truth in it, that he was "a man of universal superficial knowledge."

He became a loyalist on the arrival of General Gage, and left the country at the breaking out of the Revolution. He went to Halifax where he died about October 1776.

The sudden conversion of Mr. Brattle from a whig to a loyalist is so graphically described by the late President Adams that I am induced to transcribe it even at the hazard of departing from my determination to confine these sketches to the professional character of the subjects of them.

"Brattle was a divine, a lawyer, and a physician, and however superficial in each character, had acquired great popularity by his zeal, and, I must say, by his indecorous and indiscreet ostentation of it, against the measures of the British government. The two subtle spirits, Hutchinson and Sewall, saw his character, as well as Trowbridge who had been his rival at the bar for many years. Sewall was the chosen spirit to convert Brattle. Sewall became all at once intimate with Brattle. Brattle was soon converted and was announced a Brigadier General in the militia. From this moment the tories pronounced Brattle a convert, and the whigs an apostate. This rank in the militia, in the time of peace, was an innovation, and it was instantly perceived to have been invented to take in the gudgeon."[1] (Morse's Revolution, 204.)

[1] The following notice of the departure of Mr. Brattle from Massachusetts is copied from the Boston Gazette.

"Norwich, May 13, (1776.) We hear that the Rev. General Brattle, Attorney at Law and Doctor of Physic, went from Boston to Halifax in character of Commissary, Cook. It seems in the hurry and timidity of the flight, this complication of excellencies, notwithstanding his eminent services, particularly in feeding the rabbits and singing that beautiful elegy to their memory, was entirely

JEREMIAH GRIDLEY was chosen Attorney General in 1742. He held the office for a single year only at this time, but in 1767, upon the appointment of Trowbridge, Judge, he was appointed to the office of Attorney General by the Governor and council.

At the time of making this appointment, the Governor nominated Jonathan Sewall to act as special Attorney General in cases where Gridley should be prevented from attending, but the Council refused to concur in Sewall's appointment and suppressed his commission.

He was graduated at Cambridge in 1725, and studied theology. He was engaged as an assistant in the grammar school in Boston, and at the same time was a preacher of the gospel.

In 1732, he commenced a newspaper in Boston, called the "Rehearsal," which was the sixth paper in order of time, published there. It continued but a single year.

After studying law, he became one of the most distinguished lawyers in the Province, especially on account of his extensive and accurate learning. He was an easy and graceful writer, being imbued with the spirit of classical literature. But as a speaker he was rough and ungraceful, hesitating in his utterance but energetic in his manner, and impressive by his peculiarly emphatic use of language. Even to the court his manner is said to have been magisterial when expressing any opinion in their presence.

He was a representative for some years from Brookline, and was ranked with the whig party of the day, but his connexion with the famous application for "writs of assistance" lost him the confidence of his political friends.

forgotten and had no birth provided for him, although he was allowed to have a singular talent at running away."

The question in regard to these writs was argued before the court in 1761, and it is stated by Allen and Minot that Gridley acted as "King's attorney" on that occasion. If by that is meant "Attorney General," as Elliot states that he was, he must have received the appointment temporarily, which may have been the case, as I find by referring to the records that Trowbridge was commissioned anew in 1762.

However this may be, he acted in behalf of prerogative on that occasion, and was opposed by James Otis in his memorable speech so eloquently described by the late President Adams.

In 1767, Trowbridge was made Judge of the Superior Court, and Gridley succeeded him as I have stated, and held the office till his death, which occurred September 7, 1767.

Besides his civil offices, he was Colonel of a regiment of militia. His brother Richard was a distinguished military officer, and laid out the works on Breed's Hill, the day before the battle of the 17th June, 1775.

Col. Gridley was a man of fine social qualities, and greatly beloved by all who were connected with him by social or domestic ties.

His eminence in his profession rendered his office a favorite place of resort for students, and some of the most distinguished lawyers in Massachusetts received their professional education under his instruction. Among these it will be sufficient to name Chief Justice Pratt, James Otis, Oxenbridge Thacher and William Cushing. His place of residence was in Brookline. He was indifferent to the acquisition of wealth, and died insolvent.

James Otis was chosen Attorney General in 1748, and held the office for a year, when Trowbridge was appointed to succeed him. He is commonly known as Colonel Otis,

in distinction from his more eminent son James. He was a native of Barnstable, and was born in 1702. Although not a liberally educated man he became a leading and eminent lawyer. Governor Shirley, who had been himself a lawyer, promised him a seat upon the Superior Bench when a vacancy should happen, but he did not keep his promise. Upon the death of Chief Justice Sewall in 1770, he was again a prominent candidate for a place on the bench, but Governor Bernard appointed Lieutenant Governor Hutchinson to the place of Chief Justice, which gave great offence to Colonel Otis's friends.

Colonel Otis was also a leading political man. In 1760, and 61, he was speaker of the House of Representatives. He was also Colonel of a regiment of the militia at a time when both honor and influence belonged to the office. He was also soon after a member of the Council. In 1764, he was appointed Judge of the Common Pleas and Judge of Probate for the County of Barnstable. During the last years of Governor Bernard's administration, he was uniformly elected to the Council and as uniformly rejected by the Governor. Upon Hutchinson's coming into office he was approbated as Counsellor, and was a member of that board at the commencement of the Revolution. He died in November 1778.[1]

[1] Mr. Holmes in his address to the Bristol bar gives the following account of Colonel Otis's studying law. "He was a man of great natural talent and had a pretty good education. But he never had the most remote idea of paying any attention to the study or the practice of law until suggested to him under the following circumstances. He was accidentally attending court when one of the parties to a suit then in order for trial, being destitute of counsel, importuned Otis to assist him. Otis agreed to. The action was on a mere question of fact and depended on evidence. Otis in managing this case showed so much ability and strength of argument, that the court and all his friends advised him to attach himself to the practice of law, with which he complied, got him such books as were then to be obtained—Coke's Institutes, Brownlow's Entries and

EDMUND TROWBRIDGE was commissioned by the Governor and Council as Attorney General June 29, 1749. He held the office till his appointment as judge of the Superior Court in 1767.

He will be further noticed in connexion with that court.

JONATHAN SEWALL was the last Attorney General under the charter. He was appointed to the office November 18, 1767. He was the nephew of Chief Justice Stephen Sewall, and was left an orphan, and destitute of property, in early life. He was indebted to his friends for his early education. He was graduated at Cambridge in 1748, and for eight years pursued the business of teaching school. At the end of this period, Chambers Russell of Lincoln, then a judge of the Superior Court, generously took him into his family, gave him a legal education, furnished him with books, and introduced him into practice at the bar. He commenced practice in Charlestown, but used to attend the courts in the neighboring counties. At this period he was a whig in politics, and the circumstances of his conversion to the opposite party will serve to illustrate the influences that were exerted over men whose services could be turned to account by the government.

He was a man of fine talents and highly honorable feelings. He became administrator of his uncle Stephen's estate, which proved to be insolvent. To enable him to pay the debts of the Chief Justice, he applied to the General Court for aid. His petition was presented by Colonel Otis, but was rejected, which was a source of great mortification and chagrin to him. This was immediately known to the government party, especially Governor

Plowden's Commentaries and Reports, and commenced *reading* and *practising*."

Hutchinson, and they forthwith began the work of winning him over to their cause.

As no office was vacant, the attainment of which was a sufficient lure, a new office was created under the name of Solicitor General, and given to him June 24, 1767. He had married the year before, the daughter of Edmund Quincy and grand daughter of Judge Edmund Quincy, a lady of distinguished accomplishments. The office of Attorney General becoming vacant by the elevation of Judge Trowbridge, Sewall was appointed to fill it November 18, 1767, and was succeeded as Solicitor General by Samuel Quincy who was a cousin of his wife. He, at the same time, held the office of Advocate General of the the Court of Admiralty, having been appointed May 28, 1767, in the place of Mr. Bollan, to hold the office during his absence, which appointment was renewed in September of the same year.

In 1769, he was appointed Judge of Admiralty for Nova Scotia and was to reside at Halifax. He did not remove there, but in July of that year visited Halifax for the purpose of appointing Deputy Judges for Quebec and Halifax, and returned to Boston by the same vessel in which he had sailed from there.

As a lawyer, Mr. Sewall was eminently successful as an advocate, and able as a counsellor. "He had a soft, smooth, insinuating eloquence which glided into the minds of a Jury, and gave him at least as much power over that tribunal as any lawyer ought ever to possess. He was capable too of discussing before the court any intricate question of law which gave him, at least, as much influence there as was consistent with an impartial administration of justice."

He was a distinguished political writer, and a series of papers over the signature of "Massachusettensis," which

were published in the Boston Gazette in 1774 and 5 were the most able defence of the measures of the government that appeared in the discussion that was carried on previous to the Revolution.

Besides his merits as a writer, and his ability as a lawyer, he was distinguished as a gentleman and a scholar, and possessed an infinite fund of wit, humor and keen satire.

For many years he was a bosom friend of President Adams, but the difference in their political views alienated them from each other.

He left Massachusetts in 1775, and went to England, where he resided near Bristol for some years. In 1788, he returned to Halifax where he died. He left two sons, one of whom was Attorney General and the other Chief Justice of Canada.

SAMUEL QUINCY was the last *Solicitor General* before the revolution, and succeeded Jonathan Sewall in that office, though he does not appear to have received the appointment till March 21, 1771.

Indeed the office seems to have been regarded by the government, rather as a means of seducing ambitious men into the support of their measures, than as an essential part of the judicial system.

Quincy was a brother of the distinguished orator and patriot, Josiah Quincy, Jr., was a personal and intimate friend of John Adams, having been admitted to the bar with him on the same day, Oct. 1758, and had such ties and associations with the American cause, that it might have been expected he would have taken part with the patriots in their struggle for liberty. But unfortunately for him, his brother rose to a higher degree of eminence in his profession, though younger than himself, and Hutchinson and Sewall were ready to fan the jealousy which

he felt, on this account, into a hostility against those who favored the younger and far more able branch of that distinguished family. He became a loyalist and shared the common fate of his associates. He was obliged to leave the country at the breaking out of the Revolution, and went to Antigua, where he was appointed King's attorney and held the office till his death, in 1789.

Mr. Quincy was educated at Cambridge, and was graduated in 1754.

Before dismissing the subject of the office of Attorney General it may be proper to notice further the contest that continued between the House and the Governor as to the appointment of the incumbent. Although after 1749, the place was actually filled by the Governor and Council, the House continued to insist upon his being an elective officer. An occasion for discussing the subject arose in 1762, upon the application of Trowbridge, then Attorney General, for compensation for his services in the office. The subject was referred to a committee of which James Otis was chairman, and their report was against granting "any pay or salary to any person officiating in said office whom they had no hand in choosing." But in June 1763, the sum of £300 was voted to him for his services, though the principle contended for, was not abandoned. (Tudor's Otis, 161.)

In thus noticing those who had been Attorneys General and in speaking as I shall of the members of the Superior Court, many of the leading members of the profession previous to the Revolution will have been described, as far as the limits of this work will permit. And of those who remain, nothing but a very brief sketch can find a place in a work already swelling beyond its original design.

Nor have I any means of obtaining an entire list of the early lawyers in Massachusetts. The names of the attorneys

in the several courts might be ascertained by examining the record of each particular case. But so few of these were entitled to the designation of *Lawyers* that it would throw no light upon the subject.

Joseph Hearne is thus noticed in the Boston News Letter under date December 26, 1728. "On the 18th instant, died here Joseph Hearne, a noted lawyer in this place, aged nearly 70 years, and was decently buried from the Custom House."

From the same paper of 1733, I copy a notice of another member of the profession who seems to have owed his little share of immortality to any thing rather than good success. "We hear that Mr. Weldon, attorney at law, who went away from this town about a fortnight ago considerably in debt, is taken and confined in New London jail." The next notice we have of him was the following year, when it appears he escaped to New York and went from there to London, where he committed suicide.

In 1737, Joseph St. Lawrence, who had been an attorney of the Court of Exchequer in Ireland, was admitted and sworn as an attorney in the Superior Court, and opened his office, in "Wing's lane near the Town dock." (News Letter.)

Mr. Holmes mentions Otis Little and Elisha Bisbee as lawyers practising in the old colony, while Ruggles and Colonel Otis were at the bar, about 1740.

I find the name of Isaac Littles in 1720, associated with those of Auchmuty and Read in a case where Valentine, afterwards Advocate General, was opposed to them. From his being thus aided by the two most eminent lawyers at the bar, it is probable his rank in the profession was not very eminent. He resided, I believe, in Marshfield, and was one of the deputies of that town in the Gen-

eral Court of Plymouth before its union with Massachusetts.

After the union of the colonies he continued to be a member of the House, and in 1740 was removed from his office as Justice of the Peace by the Governor, for being concerned in the passage of bills of the Land Bank.

In 1732, he had been chosen to the Council but was rejected by the governor.[1]

WILLIAM SHIRLEY was born in England and came from London, where he had been in practice, to Boston in 1733, where he resumed the profession of the law, and continued in practice until his appointment as Governor in 1741. He held this office from 1741, to 1756, during which time the memorable expedition against Cape Breton in 1745, was planned and executed. During a part of the time of his being Governor, he was commander in chief of the British forces in America, but was not a successful general.

His character as Governor was deservedly popular.

His industry was unremitting and his discernment and sagacity as a politician eminently qualified him for the place.

His first wife was an English lady of good family, who died while he was Governor. After her death he was employed as a commissioner to adjust the lines between the English and French possessions in America, and visited Paris in executing this commission. While there he married a Catholic lady, which gave great offence to the people of Massachusetts, and was one cause of his removal from the government.

He was transferred from the government of Massachu-

[1] I copy the following from the Boston Evening Post under date of 1747. "April 13, died, Mr. Andrew Lane, a very honest and faithful Attorney at Law."

setts to that of one of the Bahama Islands. He left the Island where he was succeeded by his son, and returned to Massachusetts in 1770, and resumed his former residence in Roxbury, where he remained until his death, March 24, 1771, in the 77th year of his age. He was buried with the honors of war. He died poor, leaving nothing to his posterity but a most excellent and honorable reputation.

There is so much more of eclat in the life of a political favorite of the public, or the career of a military man, than the unobtrusive and laborious life of a lawyer, that the professional character of Mr. Shirley has been obscured by the more dazzling fame of his public life.

There is however satisfactory evidence that he was able and eminent in his profession and successful in his practice.

I have had occasion heretofore to state his appointment as Advocate General in the Admiralty Court, and should be transcending my limits by enlarging any farther upon the incidents of his life.

William Bollan may be mentioned here rather on account of his connexion with Governor Shirley, than precedence in point of time. He was born and educated in England, and came to this country at the time of Shirley's being appointed Governor, and appears to have studied law awhile with the elder Auchmuty. He married a daughter of Governor Shirley. He was an eminent lawyer and for some years Advocate General of the Court of Admiralty. While in full and successful practice in his profession he was chosen agent of the Province to visit England, in 1745, in relation to a reimbursement of the expenses of the expedition to Cape Breton. In a letter written subsequent to this he states, that at the time of his appointment he was concerned in all the best business

of his profession in the Province, and in a great deal of profitable business in some of the neighboring governments, yielding him more than £500 a year. Just before his election as agent he had been appointed Collector of Salem and Marblehead.

He was exceedingly faithful and successful in his agency, and remained for many years in that place. He was dismissed in 1662, but still continued agent of the council. He remained a firm friend of the Province and rendered whatever services were in his power towards effecting a conciliation with the mother country. He visited Massachusetts in 1748, but was soon after sent again to England as agent, where he seems to have remained until his death in 1776. During his absence, however, he was still regarded as the Advocate General, until September 1767, the terms of the commission of the intermediate incumbents of the office having been "during the absence of Mr. Bollan."

He wrote and published many political essays, but does not appear to have attained to any great celebrity as an author.

James Otis, Jr. has found too able a biographer in the late accomplished Mr. Tudor, to require any further notice than his connexion with the profession which he honored. He was the son of Colonel James Otis of Barnstable, and was born there in 1725. He was graduated at Cambridge in 1743. He studied law with Mr. Gridley, and commenced practice in Plymouth. After remaining there two years, he removed to Boston where his practice became very extensive. His rank at the bar was unrivalled for learning and eloquence, and among other marks of the estimation in which he was held was his appointment to the office of Advocate General within a few years after his admission to the bar. He held this office till

1761, and resigned it rather than sustain the application for "writs of assistance." His memorable speech in opposition to the granting of these, has been made a matter of familiar history. In 1761, he was chosen a representative from Boston, and in 1766, was chosen speaker of the House, but his election was negatived by the Governor.

In 1770, he was brutally attacked by Robinson, one of the commissioners of the customs, and was so seriously injured as to be obliged soon after to leave public life. The trial growing out of this attack has been mentioned in a former part of this work. The jury awarded him £2000 damages which he voluntarily relinquished to the defendant. The last years of his life he was comparatively retired from public life. He was killed by lightning, May 29, 1783. He was not only a sound lawyer and an able politician, but a finished scholar and a somewhat extensive author. The last few years of his life were spent at Andover. Many anecdotes are preserved of his honorable course of professional practice. Among these was the stopping the progress of a suit and voluntarily becoming nonsuit, because he had discovered while the judge was addressing the jury, a receipt in the hands of his client which belonged to the other party, and which showed that his client had been paid the debt for which he was prosecuting the action.

Of the eloquence, patriotism and talents of James Otis, Jr. there is no occasion here to speak. Their remembrance is familiar to almost every American, and his name will go down to posterity as it has come down to us, as among the first of an age distinguished beyond all others in our history for eminent and able men.

Oxenbridge Thacher was so intimately connected with Mr. Otis in the events of the last century, that his name naturally occurs in this place. He was born in Mil-

ton, and was graduated at Cambridge in 1738. He was then eighteen years of age. He first studied theology and preached awhile, but his voice being feeble he left the profession and entered the office of Mr. Gridley, with whom he completed his legal education. He rose to great eminence in his profession, and was not only a learned lawyer, but an accomplished scholar and sound moralist.

He also engaged zealously in the politics of the day, in favor of liberty, and was associated with Mr. Otis in the argument of the question relative to the granting writs of assistance, in which they were opposed by their former tutor and instructor, Mr. Gridley.

Mr. Adams, in describing the manner in which he conducted the defence in this case, gives a graphic sketch of the character of Mr. Thacher's oratory. He argued the question "with the softness of manners, the ingenuity and the cool-reasoning which were peculiar to his amiable character."

He was chosen a representative from Boston in 1763, and continued a member of the House till his death, which took place July 8, 1765. He died at the early age of forty-five, and so early in the struggle for independence, that his name is not generally associated with those leading spirits who survived him. His constitution was always feeble and his slender frame was a premonitory of the disease, a pulmonary consumption, of which he died. Hutchinson, although an uncompromising hostility existed between him and Mr. Thacher, thus speaks of him in connexion with the fact of his election to the House. "Death is the common enemy of patriots and courtiers, and in about two years frustrated the expectations which many had formed of long continued benefit from his talents in supporting the side of liberty, from the zeal with which he engaged."

His fame as a lawyer survived in the character of those who entered the profession under his instruction, among whom, it is enough to name, Judge Lowell and Josiah Quincy.

His father was the minister of Milton, and his son Peter Thacher was the minister of Brattle street church in Boston. He was himself distinguished as well for his piety as his patriotism, and "his death was universally lamented as a great loss to the public."

Benjamin Pratt. The name of Mr. Pratt is too intimately associated with the character of the Massachusetts bar to be ever forgotten by any one who may write its history. His success is an illustration of what may be accomplished in the profession by study and assiduity.

He was born in 1709, in Cohasset. His parents were poor and in very humble life, and he himself was bred to a mechanical trade. He lost a limb under circumstances of severe suffering, attended with a long and painful sickness, and upon his recovery he was led to apply himself to a preparation for college. He entered Cambridge in one of the higher classes and was graduated in 1737. His standing there graduating it by the rank of his family, was the lowest in his class. But he surmounted all these embarrassments. He found a friend in Mr. Auchmuty, in whose office he read law, and whose daughter he afterwards married. He was then and long after an indefatigable student, and such was his intensity of application that he would sit engrossed with his law book while he was suffering such excruciating pain from his limb which had been amputated, that large drops of sweat ran down his cheeks.

He soon rose to eminence, and took the very first rank in his profession for learning and ability.

He mingled, too, in politics, and from 1757, to 1759, represented Boston in the General Court.

In his politics he was opposed to Governor Shirley, but was a personal friend and supporter of Governor Pownal.[1]

In 1761, he was appointed Chief Justice of New York, through the influence of Governor Pownal, and for that reason declined taking any part in the discussion of the question relative to writs of assistance, although both sides applied to him as counsel. He was present at the hearing, and his appearance is graphically described by Mr. Adams in a passage from one of his letters, which I have quoted in another part of this work.

An interesting address from the bar to Mr. Pratt on his leaving Massachusetts, and his reply to the same, which are found in the newspapers of the day, serve to show the high estimation in which he was held by his associates who knew him best. Great jealousy was felt by the profession and people of New York, in having a stranger appointed to the place of Chief Justice of that Province. But the consummate ability exhibited by Mr. Pratt in the trial of some exceedingly intricate and important causes which early came before him, overcame this feeling entirely, and secured the confidence and esteem of all parties.

He died in 1763, at the age of 54 years.

There may not perhaps be a more fit connexion in which to mention the name of another lawyer, who though never a member of the Massachusetts bar, may very properly be noticed while its members are under consideration.

John Gardner was the son of Stephen Gardner, and

[1] In the notice of his appointment as Chief Justice of New York in the Evening Post, he is called "his Majesty's Advocate General," from which I infer that he had been appointed to that office upon the resignation of James Otis.

was born in Boston. He went to London where he entered the Inner Temple, and in June 1761, "was called and admitted to the degree of Barrister or Counsellor at Law," "by the Honorable Benchers of the Inner Temple."

In the account from which I have taken this statement, it is added from a London paper, "We hear he is the first gentleman from Boston that ever attained to that honor."

In 1767 he was appointed Chief Justice of the Province of New York, and is spoken of, thus early in his professional life, as "an eminent lawyer in England," where he was in practice at the time of receiving the above appointment.

Timothy Ruggles. Whatever may be thought of Mr. Ruggles as a politician, no one can deny his claim to a high rank as a lawyer. He was born in Rochester, Mass. October 11, 1711, and was the son of a clergyman. He was graduated in 1732, and soon entered upon his studies as a lawyer. He commenced practice in Rochester, and at the age of twenty-five, represented that town in the General Court. Among the laws which he was instrumental in passing, was the very salutary one which has been in force ever since, prohibiting sheriffs from filling writs. After residing awhile in Rochester, he removed to Sandwich, where his business became very extensive, leading him into other counties, even as far as Worcester. In addition to his business as a lawyer, he married a widow and opened a tavern, in which he performed the duties of landlord, hostler and bar keeper to the great acceptance of his guests. About 1755, he removed to Hardwick, in Worcester county, where he continued to practice law, except while absent in the army, until 1757, when he was made a Judge of the Court of Common

Pleas, and in 1762, was made Chief Justice of that court, for the county of Worcester. As a lawyer he was sound and ingenious, as an and advocatehe was more distinguished for strong and vigorous argument than any grace of eloquence.

He was also distinguished as a military man. In the expedition against Crown Point in 1755, he held the office of Colonel under Sir William Johnson. And in the battle at Lake George, the same year, in which Baron Dieskau was defeated, he was second in command.

He remained in the army until 1760, and for the last three years held the office of Brigadier General under Lord Amherst.

He was always afterwards known as "Brigadier Ruggles," and is still remembered by that title, throughout Massachusetts.

He was less fortunate, but not less distinguished as a politician than in his other spheres of public life. He represented Hardwick several years in the Legislature, and was speaker of the House during the years 1762 and 3.

In 1765, he was one of the three delegates selected on the part of Massachusetts to meet delegates from the other colonies in convention. The convention assembled in New York, and consisted of twenty-eight members. Mr. Ruggles was chosen President. He did not concur in the resolutions which the convention adopted, and on his return home was publicly censured in his place by the speaker of the House.

He was a firm and consistent loyalist, and of course became extremely unpopular in the Province. In 1774, he was made a "Mandamus Counsellor," and had the courage to accept the appointment, notwithstanding the state of exasperation to which the public feeling had been roused against the measures of the crown.

He continued firmly attached to the royal cause, and at the breaking out of the Revolution abandoned his extensive estates in Hardwick, and went to Boston where he remained a short time, and from thence went to Long Island. After a few months residence there, he removed to Halifax, where he resided until his death in 1798, at the age of 87.

Mr. Ruggles had many qualities to attract and win public favor, if his politics had not been altogether adverse to the opinions of those by whom he was surrounded. In person he was large, more than six feet in height, with a fine manly expression of countenance and dark complexion. His manners were dignified though somewhat abrupt, while his wit, learning and good sense made his society generally attractive. He was a spirited promoter of the public interests around him, social in his habits, but at the same time temperate himself, almost to abstemiousness, and his liberal hospitalities were long remembered. As a judge he was faithful, able and incorruptible. As a soldier he was brave, generous and well versed in the science of war. But as a politician, though he may have been as honest as it is possible for a politician to be, he was, to say the least, unfortunate, and his name has not come down to us with enviable notoriety.

While at the bar he was a rival of Col. Otis, and many anecdotes are preserved of the practical and rather coarse pleasantries played off by one upon the other, which seem more suited to the state of the profession as it then was, than to what we now see it. His extensive estates were all confiscated upon his leaving the Province, but his losses were made up to him by the munificence of the crown.

John Worthington was cotemporary with Brigadier Ruggles, and held perhaps as respectable a rank in the profession. He was born November 24, 1719, in Springfield,

and was graduated in 1740, at Yale College, after which time he was, awhile, a tutor in that institution. In 1743, he began to study law with General Lyman of Suffield, and the following year, commenced practice in Springfield where he acquired an extensive practice, and became King's Attorney for Hampshire County. From the account given of him by the late Honorable George Bliss, himself a distinguished ornament of the bar of "Old Hampshire," it appears that his attainments as a lawyer were very respectable, and that he was an able advocate. He had a lively imagination and ardent feelings. His ideas flowed rapidly, and he possessed a great command of language as a speaker. His style was nervous, forcible and uncommonly pure and correct. Nor was his knowledge confined to his own profession. He had a taste for general science, and as a politician, he took a leading and conspicuous place.

He was chosen to attend the convention of colonies in New York, in 1765, but declined the place.

In politics he was inclined to be a loyalist, and was appointed one of the Mandamus Counsellors, but understood the tone of public feeling too well to accept so odious an office.

Upon the interruption of the courts in 1774, he retired from the bar, and never resumed the practice. He lived in retirement in Springfield after the revolution till his death in April 1800, in the 81st year of his age. His daughter was the wife of Fisher Ames.

Joseph Hawley, a cotemporary of Colonel Worthington, and a practitioner at the same bar, was his superior in many respects, and far more fortunate in his political course.

He was born in Northampton in 1724, and was graduated at Yale college in 1742. He studied theology and

preached for sometime, but never was settled as a clergyman. He accompanied the expedition against Louisburg in 1745, as a chaplain in the army. After his return he studied law with General Lyman, of Suffield, and commenced practice in Northampton about 1749. Here his business became extensive, and his reputation rose to that of the first rank in his profession. His learning as a lawyer, especially in regard to the early or black letter English law, was profound, and his powers of argument, as an advocate, were felt and acknowledged by all who heard him. It was only, however, when he was convinced of the justice of his cause, that he put forth his strength, nor was he willing to engage in any cause where he was not satisfied, at the outset, that his client had justice in his favor. His eloquence was grave, austere and impressive. This resulted somewhat from his manner, which had the gravity and solemnity of the puritan age. He was, moreover, subject to fits of melancholy or despondency, but it did not impair the vigor of his intellect, or the manliness of his character. He was in all things strictly conscientious and had an instinctive abhorrence of every thing approaching deceit.

In his political views he was, to all intents, a patriot and a whig, and his influence was most extensively felt through the Province. In consequence of this, there was an attempt made to silence him as a lawyer, and in 1767, an occasion was seized which succeeded for a short time. There was a trial of several individuals before the Superior Court for a riot, in the county of Berkshire, in which Hawley was counsel for the defendants. He published an account of the trial in the Boston Evening Post, in which he indulged in some severe, but merited, strictures upon the opinions advanced by the court in the course of the trial. The court taking umbrage at the remarks,

struck his name from the rolls of the court. But he was restored the following term upon the motion of Colonel Worthington, who though a rival was a generous one.

Mr. Hawley never practised at the bar after the commencement of the Revolution.

His course as a political leader was firm, judicious and eminently consistent. He was many years a member of the House of Representatives, and it is said no measure was ever carried against his opinion. The members had great confidence in his judgment, and a perfect conviction of his honesty, and his appeals to them rarely proved unsuccessful. Even Hutchinson accords to him purity of motives, and says that "he was more attended to in the House than any of the leaders." He accepted of none of the many places of honor and trust that were offered him, and rose by the force of his own character to the rank which not only his cotemporaries but posterity have assigned him. He died in March 1788, aged 64.

Samuel White of Taunton was a cotemporary at the bar with Colonel Otis. He was born in 1710, and was graduated at Cambridge in 1731. As a lawyer he was "famed for his accuracy in making writs." The following obituary notice of him is taken from the Boston Evening Post. March 20, 1769, "Died at his seat in Taunton, Honorable Samuel White, aged fifty nine. A gentleman well known in this government from the many public stations in which he has appeared, and well esteemed for the attention and integrity with which he demeaned himself in them. For many years he represented the town of Taunton in the General Court, and several of the last years (1759, 1764, and 1765,) was chosen speaker of the House, from whence he was chosen one of his Majesty's council the last three years. By long application and

fidelity in the practice of the law, he had acquired a handsome estate and a fair character."

Benjamin Kent was a barrister and lived in Boston, although his business as a lawyer led him into other counties. He was a native of Charlestown, and was graduated at Cambridge in 1727, and studied divinity. In 1733, he was settled over the church in Marlboro', and remained there till February 1735, when he was dismissed from his connexion with that society, and brought an action against the town for the recovery of his settlement money, in which he prevailed. Not liking the profession he had chosen, he abandoned it, and studied law. The reason given for this change is said to have been the natural gayety of his disposition, which was unsuited to the gravity of the clerical profession.

He was not greatly distinguished in his profession, although he acquired considerable popularity as an advocate and practised with good success.

In 1767, he had become the oldest member of the profession but one, in the Province. Being in his political sentiments a royalist, he left the country at the breaking out of the revolution and went to Halifax, where he died at the age of 81 years in 1788.

Samuel Fitch was a barrister in Boston. He received an honorary degree at Cambridge in 1766, but whether he had previously been graduated at any college does not appear.

He must have been a lawyer of some eminence, as he was appointed Advocate General of the Court of Admiralty about the year 1770, and held the office until the Revolution.

From his holding office under the crown he doubtless belonged to the royalist party, and left the country with many other members of the profession whose associations

with the government involved them in the opposition to the revolutionary movements of the people. He was among those who were forbidden by the legislature to return into the Province.

Richard Dana belonged to Boston, and was the father of Chief Justice Francis Dana. Perhaps I cannot do better justice to this distinguished man than by transcribing an obituary notice which I find in the Boston Evening Post of June 1, 1772. "On Saturday 17th May last, died at his house in Boston, Richard Dana, Barrister at Law, 72 years of age. He was a gentleman of unblemished morals. By his liberal education, very good natural powers and diligence in the study of the law, he was eminent in his profession. He was faithful to his clients and unjust to no man. Ever since he came into business he was exemplary in carefulness, diligence and frugality, whereby he left to his widow, only sister of the Honorable Judge Trowbridge, and to his children, two sons and one daughter, a handsome fortune.

He hated flattery agreeable to the natural but honest severity of his manners.—He was a most inveterate enemy of luxury and prodigality. A very steady, strenuous and it must be confessed many times a passionate opposer of all those, even from the highest to the lowest, but especially the former, who in his judgment were enemies to the civil and religious rights of his country, and he very well understood what those rights were.

In short, to Mr. Dana may be applied with great justice Horace's

"Justum et tenacem propositi virum,
Non vultus instantis Tyranni
Mente quatit solida."

Daniel Farnham lived in Newburyport. He was graduated at Harvard College in 1739, and died at the age of

59, in the year 1776. The late Honorable Levi Lincoln read law in his office awhile when pursuing his professional studies. Mr. Farnham practised also in the courts of Maine and for awhile was King's Attorney of the county of York. His practice was extensive up to the time of the Revolution.

WILLIAM PYNCHON was born in Springfield in 1725, and belonged to the ancient and respectable family of that name. In 1745, he removed to Salem, where he studied law with Mr. Sewall and afterwards resided until his death in March 1789, at the age of 64.

He was an eminent lawyer and was distinguished for his skill as a special pleader. He was moreover a finished scholar and an accomplished gentleman, and an ornament of the Essex bar which has been distinguished for the eminent men who have been engaged, there in the profession of the law.

JOHN CHIPMAN belonged to Marblehead. He was the son of the Reverend John Chipman, and was graduated at Cambridge in 1738. He was the father of Ward Chipman of New Brunswick, one of the commissioners in settling the boundary line under the treaty of 1783. His grandson is the Chief Justice of that Province. He died of an apoplectic fit while attending court in Falmouth, Maine, in July 1768.

He was in the habit of attending the courts in Maine in company with Gridley, Jonathan Sewall and other gentlemen of that character.

NATHANIEL PEASELEE SARGENT was born in Methuen in 1731. He was graduated at Cambridge in 1750. He practised law in Haverhill and held a high rank in his profession, though never a distinguished advocate. At the organization of the Superior Court in 1775, he was appointed a Judge of that court, but declined the office.

The following year, however, he was reappointed and accepted the place. In 1790, he succeeded Judge Cushing in the office of Chief Justice and held it until his death, October 1791. He was sixty years of age at his death, and left behind him the character of an able and impartial judge.

JOHN LOWELL was born in Newbury in 1743, and was graduated at Harvard in 1760.

He studied law in the office of Oxenbridge Thacher and began practice in Newburyport, but soon after removed to Boston. He there became a leading and distinguished man, and as a member of the convention that formed the constitution of Massachusetts, he took a prominent part. In 1781, he was chosen a member of Congress, and in 1782 was appointed one of the three judges of the court of appeals to whom appeals lay from the court of Admiralty.

In 1789, he was appointed Judge of the District Court of the United States, and held that office until 1801, when he was made Chief Justice of the first circuit, under the then new organization of the United States Court. He held the latter office until the act creating the court was itself repealed in the year 1802.

He was not only an eminent lawyer, a learned civilian, and an able judge, but he was a distinguished patron of science and a finished scholar.

He died at the early age of 58, in May 1802, universally lamented. His place of residence for some time previous to his death had been in Roxbury. He left three sons, who have been among the most distinguished men, in their various departments, in the commonwealth, John, Francis C. and Charles. The first recently deceased in Roxbury, the second gave name to the city of Lowell, having been an early proprietor of factories established there,

and the third is a well known and eminent clergyman in Boston.

William Read was of Boston, and will be noticed in connexion with the courts of which he was at different times a member.

Samuel Swift was of Boston. He was graduated at Cambridge in 1735, but I have found no particular notice of his life or character, or even the time or place of his birth or death.

Benjamin Gridley was also of Boston, and was graduated at Cambridge in 1751, and was appointed a Judge of the Court Common Pleas for Suffolk in 1775. Of him, I have found no particular account or memorial. He left the country at the breaking out of the revolution, being a royalist in politics.

Of Andrew Cazeneau, I find even less than in regard to Gridley. In 1769, he married Hannah Hammock, and in 1774, with Gridley and many other members of the bar, addressed Governor Hutchinson upon his leaving the country.

He probably left the country soon after, as his politics were not congenial to the popular feeling of the day, and his name is among those who were forbidden to return into the Province by act of the Legislature in 1778.

Abel Willard was born in Lancaster, January 1732, and was graduated at Harvard in 1752. He studied law with Benjamin Pratt and was admitted to the bar in 1755. His place of residence was his native town, and his practice became extensive.

He was a man of respectable talents, and enjoyed the reputation of great honesty and uprightness. He was at one time a partner in business with the late Judge Sprague in Lancaster. Upon the breaking out of the revolution he

removed to Boston and from thence went to England where he died in 1781.

James Putnam was of Worcester. He was born in what is now Danvers in 1725, studied law with Judge Trowbridge, and commenced the practice of his profession in Worcester, in 1749. He was very successful as a lawyer, and attained a very high rank in the profession. He was a competitor of Trowbridge, Gridley and Pratt at the bar, not only in Worcester, but in Middlesex and Suffolk counties.

He shared liberally in the favors of the government, and in return was loyal to the crown.

In consequence of this, he was obliged to seek refuge in Boston when the war began, and from thence he went to Halifax. In 1776, he went to England where he remained till the peace, after which he returned to New Brunswick, where he was appointed a judge of the Supreme Court of that Province. In this capacity he was distinguished for his ability and inflexible love of justice. He held the office till his death in October 1789.

President John Adams was among those who received their legal education in Mr. Putnam's office.

Daniel Leonard was of Taunton, and was born in Norton, in 1740. He was graduated at Harvard in 1760. He is described by President Adams as having been "a scholar, a lawyer, and an orator according to the standard of those days." He married a Miss Hammock, probably sister to the wife of Mr. Cazeneau, and by her, acquired a considerable fortune. Upon the strength of this, he set up a chariot which had till then never been done by any lawyer in the Province, and adopted great style and display in his dress and manners. He wore a gold band around his hat and gold lace upon his coat. He at first was upon the popular side in politics, but soon became a

convert to the persuasions of Hutchinson and Attorney General Sewall, and joined the party of the royalists. In consequence of this, he was obliged to leave the Province at the breaking out of the Revolution, and went to Bermudas where he became Chief Justice of the highest court in the island. He was accidentally killed by the bursting of a pistol in 1829, at the age of 89. He was the last survivor of the barristers at law who were in practice in Massachusetts in 1767.

Pelham Winslow was of Plymouth, and was the son of the distinguished General John Winslow, who is mentioned in another part of this work. He was born in Marshfield, and was graduated at Cambridge in 1753. He engaged in the profession of the law, and being a royalist in his politics, he was obliged to abandon the Province at the commencement of the Revolution. He removed to Long Island where he died in 1776.

James Hovey was of Plymouth. He was born in Cambridge and was bred to the trade of a joiner. He afterwards studied law and removed to Plymouth, where I find him mentioned as "an attorney and a magistrate in 1765." He died in Plymouth, but the time of his death I have not been able to ascertain.

Jonathan Adams was of Braintree, but I have learned nothing more of his history.

Of the others whose names are found among the list of barristers in Massachusetts in 1768, there has been, or will be, occasion to speak in other parts of this work. And it would enlarge this work to an unreasonable extent, were brief justice, even, to be done to those lights of the profession who have since shed lustre on the bar of Massachusetts. I must therefore be content to confine myself to such notices as I have offered or may be able to offer of those members of the bar who have either held judicial appoint-

ments or have filled the office of Attorney or Solicitor General in the commonwealth.

It may however be proper to add to these a brief notice of one of the distinguished barristers who left Massachusetts at the Revolution,—SAMPSON SALTER BLOWERS. He was graduated at Cambridge in 1763, and was made a barrister in 1773. He resided then at Boston, and the following year married the daughter of Benjamin Kent, who has been already mentioned.

Being a royalist in his politics, he left Massachusetts and went to Nova Scotia, at the breaking out of the war, where he ever afterwards resided.

In 1798, he was made Chief Justice of the Supreme Court of that province, and I copy the following sketches of his judicial character from Halliburton's history, published in 1829, when Judge Blowers was still at the head of that court.

"The patient investigation that he gives every cause that is tried before him—the firmness, yet moderation of temper which he exhibits—the impartiality, integrity and profound legal knowledge with which he dignifies the bench, have rendered him an object of affection not only to the gentlemen at the bar, but to the public at large."

He was the last survivor of the barristers who were at the bar in Massachusetts in 1773.

I have thus, it will be perceived, brought down these sketches to the time of the dissolution of the charter government, and nothing remains, according to the original plan of the work, but to notice more at length, the several members of the Superior Court during the existence of the Province charter. To these, I shall add brief notices of some of the members of the Inferior Courts of Common Pleas in the several counties, and shall leave for others to complete the task which I have thus far accomplished.

Enough has been shown from the facts here presented to establish the connexion that exists between the character of a people and their judicial institutions. Indeed it is difficult to separate the history of the means of administering justice in a free state from the other elements of her civil history. It has been my aim to supply this element in the history of Massachusetts, which seemed to be in a good degree wanting, and so far as I have succeeded, the effort may not be without its use.

However perfect our system may have been rendered, it may be well to look back upon the changes through which it has passed, and to recal the memory of those who in ancient times sat in the places now so honorably and ably filled by the present judges of our courts.

With these remarks I must dismiss this part of my subject, and pass at once to the last division of this little work.

CHAPTER XII.

Personal notices of the Judges of the Superior Court from 1692, to 1775.

In attempting to offer a sketch of those who have sat upon the bench of the Superior Court of the Province, I cannot but again express regret that the materials for such an undertaking are so exceedingly meagre and few. So far as they were connected with the politics or ecclesiastical history of the day, their names and characters have descended to posterity. But the frail memorials of these men in their judicial capacity, are to be gleaned only from the records of courts, the scattered annotations appended to political histories, or those humble records of the past which the local histories of towns or individual institutions afford to the inquirer after the great men of by gone days. I have ascertained with accuracy the names and times of appointment of the several judges of the Superior Court during the existence of the Province charter, and for convenience prefix a list of the same to the notices which I have prepared.

William Stoughton,	appointed		Ch. J.	1692,	left		1701.
Thomas Danforth,	"	Judge		1692,		"	1699.
Waite Winthrop,	"	"		1692,	"	1701,	" 1701.
Same,	"				"	1708,	" 1717.
John Richards,	"	"		1692,			" 1694.
Samuel Sewall,	"	"		1692,	"	1718,	" 1728.
Elisha Cooke,	"	"		1695,			" 1702.

JOHN WALLEY,	app'd.	Judge	1700,			left	1712.
JOHN SAFFIN,	"	"	1701,			"	1702.
ISAAC ADDINGTON,	"			Ch. J.	1702,	"	1703.
JOHN HATHORNE,	"	"	1702,			"	1712.
JOHN LEVERETT,	"	"	1702,			"	1708.
JONATHAN CURWIN,	"	"	1708,			"	1715.
BENJAMIN LYNDE,	"	"	1712,	"	1728,	"	1745.
NATHANIEL THOMAS,	"	"	1712,			"	1718.
ADDINGTON DAVENPORT,	"	"	1715,			"	1736.
EDMUND QUINCY,	"	"	1718,			"	1738.
PAUL DUDLEY,	"	"	1718,	"	1745,	"	1751.
JOHN CUSHING,	"	"	1728,			"	1733.
JONATHAN REMINGTON,	"	"	1733,			"	1745.
RICHARD SALTONSTAL,	"	"	1736,			"	1756.
THOMAS GRAVES,	"	"	1738,			"	1739.
STEPHEN SEWALL,	"	"	1739,	"	1752,	"	1760.
NATHANIEL HUBBARD,	"	"	1745,			"	1747.
BENJAMIN LYNDE,	"	"	1745,	"	1771,	"	1772.
JOHN CUSHING,	"	"	1747,			"	1771.
CHAMBERS RUSSELL,	"	"	1752,			"	1766.
PETER OLIVER,	"	"	1756,	"	1772,		Revo.
THOMAS HUTCHINSON,	"			"	1760,	"	1771.
EDMUND TROWBRIDGE,	"	"	1767,				Revo.
FOSTER HUTCHINSON,	"	"	1771,				Revo.
NATHANIEL ROPES,	"	"	1772,			"	1774.
WILLIAM BROWN,	"	"	1774,				Revo.
WILLIAM CUSHING,	"	"	1774,				Revo.

WILLIAM STOUGHTON

Was the first Chief Justice of the Superior Court under the Province charter. Legal knowledge seems to have formed no part of the requisite qualifications for judicial offices in the early history of the Province. But the versatility of talent as well as the political shrewdness manifested by Stoughton on various occasions, supplied the want of that learning which in later days has distinguished the bench of Massachusetts.

He was the son of Israel Stoughton, well known as a leading man in the colony, having been the commander in chief of the colony troops in the Pequod war, and afterwards a Colonel in the Parliamentary army in England.

The subject of this notice was born in Dorchester in 1631, and was graduated at Cambridge in 1650, and his name stands at the head of his class, which indicates the relative rank which he held in the scale of birth and family.

He was educated for the ministry, and after completing his course of studies here, went to England and, while there, enjoyed a fellowship at the Oxford University. During his remaining in England he preached for some time in the county of Sussex, with considerable success, and continued this employment after his return to New-England. He acquired a high reputation as a preacher here, and in 1668, was chosen to preach the annual election sermon. He chose for the title to his sermon on that occasion "New England's true interest not to lie," and it was pronounced by a cotemporary to be "among the very best delivered on that occasion."

He returned from England in 1662, and although he continued to preach until 1671, he was never settled over any church.

The occasion of his discontinuing his clerical engagements was his election to the office of Assistant, which place he held by annual re-election until the dissolution of the colonial government in 1686. During this period however, he was absent in England as agent of the colony, a part of the time, having been chosen to that responsible office in 1677.

Upon the revocation of the old charter, Stoughton was commissioned under Dudley as Deputy President of Massachusetts, and in July 1686, was placed at the head of

the courts of the colony, by order of the President and council, which office he held until the arrival of Andros.

In the commission to Andros, Stoughton was named as one of his council, and unfortunately for his popularity he consented to accept the office, and thereby lost the confidence of the people while he failed to gain that of the petty tyrant whom he served.

In the new organization of the courts, under Andros, he was placed upon the bench of the Superior Court, but in a subordinate place to Dudley, the late President, who was made chief justice of the court.

With his accustomed sagacity or good fortune, Stoughton was found among the foremost of those who favored the revolution of 1689. His name stands at the head of those who demanded of Andros a surrender of the government, and he was one of the council of safety who assumed the administration until the people had an opportunity of acting upon the subject.

The people however had not sufficiently regained their confidence in his political integrity to give him any place in the government, upon their resuming the old charter, and until the arrival of the new charter he seems to have been condemned to the walks of private life.

The interval of his retirement from office, however, was short, for upon the granting of the new charter he was appointed Lieutenant Governor of the Province, and from that time till his death filled some of the most important offices in the government.

Thus in the space of a little more than six years he had shared in the offices and honors of a democracy, had been himself second in authority to a royal viceroy, had served the tyrannical representative of a royal despot, and under an entirely new dynasty found himself in the second place

of honor and trust in the Province by the distinguished favor of a new monarch.

Sir William Phipps, who was named as the first Governor of the Province, arrived here in the midst of the excitement in relation to witchcraft which signalized this period of New England's history. He was a thorough believer in the prevalence of that crime, and found in Stoughton a faith in its existence equally sincere.

By the charter, the legislature alone was authorized to create courts of judicature, but without waiting for that body to convene, Governor Phipps proceeded to constitute a special court of Oyer and Terminer to take cognizance of the unfortunate victims of this wild popular delusion. It was to consist of five judges, and at the head of these was placed Lieutenant Governor Stoughton. He entered upon the duties of his office with alacrity and honest zeal, and if ever honesty of purpose could be an apology for the baseness of an act, such would be the case with the measures pursued by Stoughton on that occasion.

He was sincere in his endeavors to ferret out the guilty causes of so wide-spread an evil, and pursued his victims with untiring assiduity, although, in so doing, he sacrificed all the better feelings of his nature, and prostituted the forms of justice to consummate a series of judicial murders that have no parallel in our history.

Upon the organization of the Superior Court under the charter, Stoughton was nominated and unanimously approved by the council as Chief Justice of that court. His commission was granted December 22d, 1692. In 1695, his commission was renewed, and he held the office until a short time before his death. During this time he also continued to hold the offices of Lieutenant Governor and Counsellor, and, a part of the time, was commander in chief of the Province troops.

His office as Lieutenant Governor often placed him at the head of the government in the absence of the chief magistrate. This was the case in 1694, upon Governor Phipps returning to England, and he remained the acting Governor until the arrival of Lord Bellamont in May 1699. Upon the departure of the latter in 1700, Stoughton was again left in possession of the government, and retained it until his death, July 7, 1701.[1]

It is not easy at this day to understand how any one could perform acceptably the duties of so many apparently incompatible offices, the first of which he derived from the crown, the second from the Governor and council, and the last by popular election. But that he contrived to retain his popularity and his influence to the last, is quite apparent from the general support of his measures which he derived from those associated with him in authority.

The bigotry of his opinions accorded with the prevailing spirit of the day, and his education and experience fitted him to be a discreet magistrate, and an influential citizen. He is represented as an able and eloquent speaker,[2] and so far at least as honesty of intentions extend, he was an upright judge.

Chief Justice Stoughton lived and died a bachelor, and made atonement for his own bigotry, by liberally contributing to the cause of education. He erected in his life time for the use of Harvard college, a building known as

[1] Lieutenant Governor Stoughton appears to have been a practical farmer, with his other avocations, for I find in Sewall's Journal the following entry, "1697, October 20, went to see Lieutenant Governor, at Dorchester, when I first saw the Lieutenant Governor, he was carting ears of corn from the upper barn."

[2] Under date July 27, 1686, Judge Sewall has this entry in his Journal, "Mr. Stoughton prays excellently and makes a notable speech at the opening of the court."

"Stoughton Hall," and at his death left a legacy of a thousand pounds to the use of that university.

He died at the age of seventy years, greatly lamented, and was buried at Dorchester, "with great honor and solemnity and with him much of New England's glory," and a Latin epitaph records his virtues, his honors and his name, and still points out to the enquirer, his grave in the ancient churchyard of that ancient town.

THOMAS DANFORTH,

Though in many respects differing from his associate the Chief Justice, was scarcely less distinguished by the marks of public and executive confidence than he.

He fills an important place in the early history of New England, not only in connexion with the courts, but with the civil and political affairs of the colony.

He was born in 1622, in the county of Suffolk, England, and came to Massachusetts with his father in 1634. His father settled in Cambridge, and was a leading and influential citizen of that town during the few years that he lived after arriving in New England.

The subject of this notice, was admitted as a Freeman in 1643, and appears to have entered public life in 1657, when he was chosen to represent Cambridge in the General Court. In 1659, he was chosen one of the Assistants, to which place he was annually elected for twenty successive years. In 1679, he was chosen Deputy Governor of the colony, and was annually re-elected to that office till the dissolution of the old charter in 1686.

In 1679, Mr. Danforth was appointed by the General Court of Massachusetts to the difficult and responsible place of President of the Province of Maine, over which Massachusetts then claimed to exercise jurisdiction.

The government of Massachusetts Bay, never seems to

have lost any thing from any over wrought delicacy in respect to interfering with the affairs of the neighboring provinces. There is not in history a more systematic course of policy pursued by one state to aggrandize itself by adroitly taking advantage of the divisions which distracted or the weakness which disarmed its cotemporaries, than that which Massachusetts pursued while a colony in regard to the surrounding colonies. The people of Maine came in for their share of this policy. By taking advantage of the divisions existing among the people in 1651, Massachusetts, who set up a claim to the whole province, induced the inhabitants to submit to her jurisdiction, and created a county embracing the province of Maine under the name of Yorkshire.

The Province thus continued a part of the colony of Massachusetts Bay till 1665, and during this time was represented by delegates in the General Court.

The claim, however, of the proprietor of Maine under the original grant of the Province from the Crown, had never been abandoned, and in 1678, the title of Sir Ferdinando Gorges, as heir of the original grantee, was confirmed by the King in Council.

Massachusetts was not inclined to abandon her claim, but was too politic openly to resist the decision of the crown. She therefore contrived to purchase the title of Gorges, and thereby became herself the "Lord Proprietor" of the Province.

Having acquired this authority, she was not slow to exercise it, and the following year the Governor and Council of Massachusetts Bay, as "the lawful assigns of Sir F. Gorges," &c. "erected and constituted a court and council," over the Proprietary. Danforth was appointed President, and a General Court for the Province was held at York in 1681.

Danforth continued at the head of the government of Maine, holding courts and administering its affairs according to the forms prescribed in the Patent to Gorges, till the arrival of Dudley as President of Massachusetts in 1686.

It is no part of the object of this notice to discuss the merits of the administration of Mr. Danforth as President of Maine. He continued during the whole period for which he held that office, to act as Deputy Governor of Massachusetts, and, most of the time, resided in Cambridge with his family, who at no time removed to Maine.

The connexion of Danforth with the government of Massachusetts embraced a most difficult and trying period. The colony had practically grown into a state of independence under her charter, and, of course, regarded with jealousy any encroachments upon the powers of self government which she had so long exercised. It would probably have been somewhat difficult to justify many acts of jurisdiction which the General Court had exercised, by a strict construction of the letter of the charter, and there were not wanting those, both at home, and in the colony, who were ready to seize upon these measures as grounds of impeaching those who administered the government. No one, however, was to be compared with Randolph for the malignity and perseverance with which he pursued the colony, and labored to subvert their charter of government.

Great divisions arose among the leading politicians of the day as to the course which should be adopted in relation to these attacks upon their colonial privileges. One party was for moderate, temporizing measures, whereby they hoped to avert the anger of the crown, and save as many of their privileges as they could. The other party, at the head of which was Danforth, were for adhering to

the charter, as they construed it, at all events, and leaving the event with Providence. Of this party were Major Gookin and Elisha Cooke. The popular sympathies were all upon the side of the charter, and Danforth as among the most able and fearless of its defenders, was the idol of the people.

The storm however which had been gathering, at last broke upon the colony. Its charter was seized, its democratic institutions annihilated, and Danforth, among others, passed into the retirement of private life.

The people were too restive under the tyranny of Andros to remain long in a state of quiet, and spontaneously rushed to the scene of action upon the breaking out of the revolution that prostrated the government which had been imposed upon them by the crown. The old charter was resumed, and Danforth was again made Deputy Governor. He continued to be re-elected to that office until the charter of William and Mary was granted, which took from the people the elective franchise, so far as the executive was concerned. His attachment to the old charter continued still unabated, and so strongly opposed was he to accepting any other from the crown that his name was omitted among the counsellors who were created by the charter of 1691. Of course, he was left out of the government upon Governor Phipps coming into power, but his influence was still extensively felt. This was particularly true in regard to the strange delusion about witchcraft, which presents such a dark chapter in the history of New England, and much was due to his efforts in finally suppressing the horrible fanaticism which had seized upon the public mind.

Upon the organization of the courts of the Province, in December 1692, Danforth was chosen one of the Judges of the Superior Court, and of the fifteen counsellors pre-

sent he received twelve votes. Notwithstanding this, however, the Governor hesitated in giving him a commission to the place of judge, until some time after he had commissioned his associates.[1] He remained upon the bench of the Superior Court from 1692, till his death which took place November 5, 1699, at the advanced age of 77.

He had thus, it will be perceived, been almost cotemporary with the existence and growth of the colony itself. During a large portion of his life, he had taken a leading part in the administration of her affairs, and although he neither appears to have had the advantages of a public education, nor ever to have pursued any regular profession in life, he proved himself to be an able magistrate, possessing great firmness of mind as well as great prudence in the management of public affairs. He probably brought to the bench no other qualifications as a judge, than disciplined common sense, extensive experience, and habits of observation and judgment which must have resulted from a long life of active public duties. But in the absence of the necessity of judicial learning he was adequate to the task of dispensing justice satisfactorily to the people, and left behind him a fair fame, and a general respect for his memory. So far as he had any pursuits beyond the performance of his public duties, they seem to have been those of agriculture. Judge Sewall who had long known him intimately, sums up his character in the following words: "he has been a magistrate forty years, was a very good husbandman, a very good christian and a good counsellor." And Chief Justice Stoughton in an address to

1 The circumstances of electing and commissioning the Judges arose from Governor Phipps giving up at the first meeting of the council the right of nomination, and only exercising the right of commissioning such as the council elected.

the Grand Jury, if the language of Judge Sewall's Journal, "takes great notice of Judge Danforth, saith he was a lover of religion, and a religious man, the oldest servant of the country, and had zeal against vice."

Judge Danforth had a numerous family of children. Two of his sons died in his life time, and his posterity survive only in the female branches of his family.

WAITE WINTHROP

Was the son of John Winthrop, Governor of Connecticut, and grand-son of the first Governor of Massachusetts. His proper name was Wait Still. He was born in Boston, February 27, 1642, and removed with his father to Connecticut at the age of eight years. He was educated a physician and during the latter part of his life practised his profession not only gratuitously, but furnished his own medicine at the same liberal rate.

While he resided in Connecticut he was one of the commissioners, for that colony, of the united colonies of New England.

When Dudley was made President, Winthrop was named of his council, and in 1687, he removed to Boston. He was also named as one of Andros' council in behalf of Connecticut, and although he never could have had any sympathy with so odious a tyrant, he was promoted to a command in the military of the colony. His character as a military man pointed him out as a proper leader at the time of the revolution in which he took an early and an active part, and he was accordingly created commander in chief of the colony forces on that occasion. He was also one of the council of safety, at the time of Andros being expelled from the government.

In the disastrous Canada expedition of 1690, Mr. Winthrop held a Major's command, but suffered, in common

with the leaders of the army, in reputation as an efficient officer.

He was appointed one of the first board of counsellors under the new charter and is the fourth in order named in the list of twenty eight. He seems to have retained the designation if not the authority of Major General, for whenever he is mentioned by Judge Sewall in his journal, he is always distinguished as "the Major General," although referred to in his judicial character.

At the organization of the courts he was appointed a Judge of the Superior Court, and was commissioned on the 22d December, 1692. He held the office of Judge until the death of Chief Justice Stoughton, upon whose death, in the absence of both Governor and Lieutenant Governor, the government fell upon the council at whose head was Mr. Winthrop. He was, moreover, appointed by the council Chief Justice in place of Stoughton. This was in August 1701. Soon after this, he was chosen agent of the Province, but the purposes secretly intended by the measure were to secure to him an appointment to the vacant place of Governor in opposition to Dudley, who was making interest to obtain the place.

While Winthrop was preparing for his voyage, it was ascertained that Dudley had been appointed Governor, whereupon the agency was rescinded, and the agent retained at home.

Dudley came into the government with no feelings of cordiality towards those who had been instrumental in subjecting him to imprisonment at the time of the revolution, and among these, Winthrop probably had his share of the Governor's displeasure. He seems to have resigned his place upon the bench upon being chosen colony agent in 1701, but still continued a member of the council, though

I find no further account of him till 1708, when he was appointed Chief Justice of the Superior Court.

It should however, have been mentioned that in 1699, he was appointed Judge of Admiralty for New York, Connecticut, Massachusetts, Rhode Island and New Hampshire, and held the office till 1701.

He continued to hold the office of Chief Justice from the time of his appointment till his death, November 7, 1717.

It is difficult at this day to determine how much Judge Winthrop owed to talents and acquirements, and how much to family for the many important offices which he filled. His family was among the highest and most respected in New England, and by his marriage with a daughter of the Honorable William Browne of Salem, he became allied with another old and influential family. These circumstances added to his great wealth, may explain some of the many honors which were so profusely showered upon him.

Hutchinson represents him as having been "a good sort of a man," "of a genius rather inferior to either of his ancestors," and as "a plain, honest man." Of his judicial qualifications, little of course can be known. From the manner in which Judge Sewall speaks of Mr. Cooke's having turned the mind of the "Major General," while consulting upon a case which had been saved for "advisement," it might be inferred that he was not distinguished for firmness or independence.

His education and manner of life, were not well calculated to fit him for the bench. But as there was no opportunity for drawing unfavorable comparisons in this respect, the mode of administering justice pursued by the courts at that day was probably satisfactory to the people.

Chief Justice Winthrop had reached the advanced age

of 75, at his death. He left children, and was the direct ancestor of the Honorable Thomas L. Winthrop, and consequently of his son, the Speaker of the last House of Representatives of Massachusetts.

JOHN RICHARDS.

One might suppose from the selection of the first board of Judges of the Superior Court, that it was considered an object to embrace as many various callings in life as the number of the Judges would admit. Richards seems to have been selected to represent the mercantile interests of the Province. He was born in England, and came to Massachusetts in very humble circumstances. It is even asserted by Randolph, that he came out to the colony as a servant.

He settled in Dorchester, and by constant assiduity in business became a wealthy and leading merchant. Among other offices of trust and responsibility which he was called upon to fill, was that of Major in the Militia, by which title he is distinguished wherever he is mentioned in Sewall's journal, even while they were associated together upon the bench.

He was for many years a representative in the General Court under the colony, and was selected by towns remote from the capital, for this purpose, while by law a residence within a town was not requisite in order to being its representative. Thus from 1671, to 1673, he represented Newbury, in 1675, Hadley, and in 1679, and 80, he was chosen from Boston, although resident in Dorchester, and during the last of these years was speaker of the House.

In 1678, through the instigation of Randolph, a commission was created, consisting, among others, of Randolph and Richards, to administer to the Governor an oath to ob-

serve the acts of trade which the colonists had practically disregarded. The commission however proved to be altogether futile, as the Governor declined taking the oath. If no other cause for refusal existed, it would have been enough that Randolph was an instrument by which it was to be accomplished.

From 1680, to 1684, Mr. Richards was a member of the Board of Assistants. During the same time he was one of the Trustees of the fund for propagating the gospel among the Indians—a fund which originated in the highest and best motives of redeeming the Indians of North America from barbarism to christianity, but which like all other efforts for the same purpose, proved unsuccessful and in the end abortive.

In 1681, Mr. Richards, with Mr. Dudley, sailed to England as colonial agents. This office was considered as a highly honorable one, but it was full of difficulty, and as in a democracy like that of New England, every freeman considered himself competent to judge of the various colonial relations, few of their agents ever found themselves able to accomplish enough to answer public expectation, and thereby few escaped censure and distrust.

He was absent in England two years, and though, while there, Randolph exhibited articles of high misdemeanor against him, as well as many other members of the General Court, to the Lords of the council, he returned to find the tide of popularity shifting against him, and the following year, 1684, he was dropped from the number of Assistants. His offence consisted chiefly in thinking it expedient to surrender the old charter, to which the people could never be fully reconciled.

He continued to enjoy the confidence of Mr. Dudley, under whose administration as President there was a new organization of the courts of the colony. Stoughton was

appointed Judge, and Richards and Simon Lynde, "Assistant Judges" of the Pleas and Sessions of the Peace. He held the office during the short period that Dudley was President, but does not appear to have held any judicial office under Andros. From his subsequent course, it is pretty evident that he did not belong to the number who sustained Andros. Thus, he became bail for Mr. Mather when he was arrested at the suit of Randolph for slander, and at the breaking out of the Revolution he acted with the people, and was one of the council of safety, who assumed the administration until the old government could be restored.

In his capacity as Assistant he sat with the Governor, (Bradstreet,) in a County Court which was held on the 30th July, 1689.

In the charter of William and Mary, he is named as one of the council, and was selected by Governor Phipps, as one of the Judges to constitute the Court of Oyer and Terminer, to whom was committed the trial of the witches. He took a part in the transactions of that court, nor is there any evidence that he did not justly share in the odium which they brought upon all the actors in that bloody drama.

At the organization of the courts in 1692, he was appointed and commissioned as Judge of the Superior Court, and held the office till his death.

His wife was the widow of Adam Winthrop, and for several of the last years of his life, he resided in Boston.

His death occurred in a very singular manner, about the 2d day of April, 1694. He dined well on the day of his death, and soon after that, falling into a violent passion with his servant for some cause, suddenly fell and expired as was supposed from an attack of apoplexy.

He was buried in great pomp and state, several military companies attended his funeral, and his pall bearers were Judges Stoughton, Danforth, and Sewall, with Russell and Brown two eminent and leading men in the Province.

To a self made man like Mr. Richards, who passed through life with so much honor, and performed duties so various and arduous with so much acceptance, it would be idle to deny strong and energetic powers of mind. What his qualifications were as a Judge, it no where appears. But from his having been repeatedly called to the duties of the place it is fairly to be presumed that a legal education was not regarded as a requisite in any wise essential for those who were to act as the interpreters of the law. And this conclusion is corroborated as well by the character and education of the other Judges who were his cotemporaries, as by the brief sketch which has now been offered of this eminent and wealthy merchant.

SAMUEL SEWALL

Was the son of Henry Sewall, who came from England and settled at Newbury. He afterwards returned to England and was the minister of Bishop Stoke for several years. Samuel was born there and remained in England till he was about nine years old, and arrived in New England in 1661. He was graduated at Cambridge, in 1671. Upon leaving College, he studied Divinity and became a fellow of Harvard College for some years, during which time, he was occasionally employed to preach. He was admitted as a Freeman in 1678, and in 1684, was chosen one of the assistants. He continued to be re-elected from year to year till 1686. For some reason he was neither of Dudley's or Andros' council, nor does he seem to have taken any active part in the Revolution. But upon the old charter being resumed he was again elected to the

Board of Assistants, and continued a member of that Board until the arrival of the new charter, in which he was named as a Counsellor.

The reason of Mr. Sewall taking so little part in the exciting scenes of the New England Revolution is not now very apparent. His patriotism seems not to have been doubted, and any objection that might once have existed to his acting in a military capacity had already been removed, as he had already become a member of the Ancient and Honorable Artillery Company, and held the office of Ensign in that corps in the year 1683. He was moreover promoted to the rank of Major of the Militia, and seems to have regarded it as a mark of honor worthy of being particularly remembered.

He was a member of the court of Oyer and Terminer, which was created by Governor Phipps, for the trial of the witches. And at the establishment of the Superior Court was constituted one of its Judges. He remained upon the bench as an associate judge, till 1718, when he was appointed to the place of Chief Justice, which he held till 1728, when he resigned it on account of his age and growing infirmities.

From the arrival of the charter, till 1725, he was a member of the council. And from 1715, to the time of his leaving the bench of the Superior Court, he also held the office of Judge of Probate for Suffolk county.

Although he was eminently a public man, he is chiefly remembered from his connexion with the courts of which he was a member. He kept a daily journal of every incident with which he was connected, even the most trivial, which covers many years of his life and furnishes a faithful transcript of himself and his personal history.

From the perusal of this journal it is apparent that he had a natural taste for legal science, which he had cultiva-

ted by a very respectable course of study. He saw how chaotic was the system of legal practice at the bar, and endeavored to introduce a corrective. In 1690, while he held the office of a commissioner of small causes, he wrote to Mr. Webb, the clerk of the court, and cautioned him not to issue writs unless they were returnable on certain days in the month, that he should not sue any book debts which were over three years old, and for the recovery of such accounts recommended *Case* instead of *Debt*. He also expressed the opinion that the dates of the charges ought to be "noted in the attachment" as much as the dates of obligations that were sued.

I know not that this was the origin of our form of actions upon the case to recover accounts charged upon book, but it shows a disposition on the part of Mr. Sewall to introduce something like order into the practice of the law.

So far as one may judge from the few records that are left, Judge Sewall must have been altogether better read in the principles of the common law than any other judge upon the bench.

His connexion with the trials at Salem in 1692, was not only most unfortunate for his memory as a judge, but a source of great sorrow to himself in after life. He acted with entire honesty of conviction while pursuing the horrid though fancied crime of witchcraft, but when convinced, as he soon became, that it was all a delusion, with equal honesty and ingenuousness he confessed his errors, and in the face of the congregation where he worshipped, asked forgiveness of God and his fellow men for the part he took in those trials.

He exemplified in his life, the virtues which adorn the christian profession, and though learned, honored and en-

trusted with power, he was distinguished for his simplicity of life, and his meekness and singleness of heart.

From his journal many curious anecdotes illustrative of the times in which he lived might be gathered, but they might seem to be misplaced in a work like the present. The following account of the opening of the new Town House in Boston, which had been created to supply the place of the one that was burned in 1711,[1] has been selected as containing some account of the forms of proceedings in court, and particularly as exhibiting a specimen of the quaint conceits which distinguish the address of Judge Sewall and were suited to the public taste of the times. "1713, April 27, First court held in the new Town House in Boston. Mr. Coleman prayed excellently. May 5, 1713, Dr. Cotton Mather makes an excellent dedication prayer in the new court chamber. Mr. Paine, one of the overseers of the work, welcomed us as we went up stairs. Dr. Cotton Mather having ended prayer, the clerk called the Grand Jury, giving their charge which was to enforce the Queen's proclamation, and especially against travelling on the Lord's day.

I said 'you ought to be quickened to your duty in that you have so convenient and august a chamber prepared for you to do it in, and what I say to you I would say to myself, to the court, and all that are concerned, seeing the former decayed building is consumed, and a better built in the room, let us pray that God would take away our filthy garments and clothe us with a change of raiment, that our sins may be buried in the ruins and the rubbish of the

[1] This was known as the "great fire" previous to 1760, "all the houses on both sides of Cornhill from School street, to what is called the stone shop in Dock Square, all the upper part of King street on the south and north side, together with the town house and what is called the old meeting house above it, were consumed to ashes." (2 Hutch. Hist.)

former house, and not be suffered to follow into this ; that a Lixivium may be made of the ashes which we may frequently use in keeping ourselves clean.

Let never any judge debauch this bench by abiding on it when his own cause comes under trial. May the Judges always discern the right, and dispense justice with a most stable, permanent impartiality. Let this large transparent costly glass serve to oblige the attorneys always to set things in a true light. May that proverb, 'Golden chalice and wooden Priests' never be transferred to the civil order, and let the character of none of them be 'Impar Sibi.' Let them remember they are to advise the court as well as plead for their clients, &c.'"

The principles of action laid down by the Judge on this occasion, must certainly commend themselves to the mind of every man who properly regards the relation that subsists between the bench and the bar, or between these and the public, and so far as these principles were applied by him, there is little doubt that he acted consistently with those he professed.

He was, withal, a very learned man in other branches than the law, and familiarly and critically acquainted with Latin, Greek and Hebrew, and was the author of many religious works.[1]

He is represented by a cotemporary biographer, as having been "universally and greatly reverenced, esteemed and beloved for his eminent piety, learning and wisdom, his grave and venerable aspect and carriage, his instructive, affable and cheerful conversation, his strict integrity and regard to justice, and his extraordinary and tender heart.

In person, Judge Sewall was large, being as he says in

[1] One of these was "Some outlines towards a description of the new heavens and new earth," 4to.—A second edition was printed in 1727.

his journal of the weight of 193 lbs, and his portrait preserved in the family exhibits indications of a full plethoric habit. He survived his resignation of the place of Chief Justice two years, and died January 1730, at the age of 77.

No family has been so much distinguished in connexion with the judicial history of Massachusetts as that of Judge Sewall.

He had two brothers, John and Stephen. John was the ancestor of Judge David Sewall of York, Stephen was the ancestor of Chief Justice Stephen Sewall and Jonathan Sewall, Judge of the Court of Admiralty in Nova Scotia, and Attorney General of Massachusetts.

Chief Justice Samuel Sewall, the subject of this notice, was the ancestor of Chief Justice Samuel who died in 1814, to whose son, bearing the same name,[1] I am happy to acknowledge my indebtedness for the use I have been permitted to make of the journal of his distinguished ancestor to which I have so often referred.

ELISHA COOKE

Was the successor of Judge Richards, and was appointed to the bench in 1695. He was the son of Richard Cooke, and was born in Boston, September 1637, and was graduated at Cambridge in 1657. He was admitted a freeman in 1673. He was educated to be a physician, but his taste and connexions in life withdrew him from a profession which he had begun to practice with success, into the more dazzling and tempting field of politics, in which he spent most of his days. Though less distinguished as a

[1] The Rev. Mr. Sewall of Burlington, (Mass.) who is in possession of many valuable manuscripts of his ancestor, and by his courtesy and kindness in regard to the use of these, has done much to throw light upon an interesting period of our early history.

politician than his son, of the same name, afterwards became, he was for many years the leader of the democratic party in the colony, and shared the odium or approbation of the government, as the one or the other party prevailed.

He entered the House of Representatives in 1681, and remained a member of it till 1683, the last of which years he was speaker of the House.

He was chosen an assistant, in the place of Dudley on account of his course in regard to the colony charter. While Dudley and many other leading men in the colony were in favor of surrendering this charter, Danforth, Cook and some others were unwavering in their determination to retain it. They carried with them the public voice, and consequently the popular favor was manifested at the elections of public officers.

But the decree had gone forth that the colony should be robbed of their charter, and Dudley was rewarded for his subserviency by being appointed President, ad interim, of the Province.

Cooke of course, was left out of the government, and continued to be an object of jealousy and hatred to Randolph and the other minions of the crown. He remained excluded from any participation in public affairs until the revolution which overthrew Andros, when, with the old Governor and several of the assistants who had been chosen in 1686, he constituted a "committee of safety," who assumed the government till some arrangement could be made to meet the emergency.

In order to justify the measures which had been pursued in relation to the resumption of their old charter, and to substantiate their charges against Andros, Dudley and the other officers whom they had deposed, the colonists thought it was necessary to send agents to represent them in England, and Mr. Cooke and Mr. Oakes were selected

for this delicate and invidious task. Mr. Ashurst and Mather were then agents of the colony, and Mr. Wiswall, a minister of Plymouth colony, was requested to accompany Cooke and Oakes.

The consequence of having so many agents was, that they differed so much among themselves, that the enemies of the colony adroitly changed the position of the agents from complainants to defendants, while Dudley and Andros not only escaped censure, but were taken into royal favor and rewarded with new offices.

The situation of the colony in regard to its charter and form of government, became a subject of discussion in England. Strong hopes were for a while entertained that the old charter would be restored. Cooke would not consent to accept any other, nor did he at any time yield his determination upon the point.

A new charter however was granted, and Sir William Phipps was created Governor, but Mr. Cooke, though he had been regularly chosen assistant, after the revolution, was left out of the commission of the twenty eight Counsellors who were named in the charter, at the solicitation of Mather, to whom their selection was referred by the King.

Mr. Cooke returned to New England, but though he had been unsuccessful in his agency, he had not lost his popularity, and at the election of 1693, was chosen one of the council. Governor Phipps negatived his election because he had opposed the appointment of that officer.

The next year, Phipps having been recalled, Cooke was again chosen to the council and was permitted to take his seat at the board. He continued a member of that board until the arrival of Dudley as Governor, and was a confidential adviser of Lord Bellamont while in the government.

Upon Dudley's coming into power, he indulged his implacable hatred against Cooke for his efforts against him at the time of the Revolution, and negatived his election as counsellor. Nor did his revenge stop here. Mr. Cooke had been appointed, as has been stated, Judge of the Superior Court in 1695, in the place of Judge Richards, and held the office on the arrival of Governor Dudley in 1702. Upon his assuming the government he issued new commissions to all the Judges but Cooke, and from that time he ceased to have any connexion with the court. Nor was he permitted, though annually elected counsellor, to take his seat at the Council Board until 1715, when he was approved of by Dudley among his last acts in the government. He did not however enjoy this return of political favor long, as he died on the 31st October, 1715, at the age of 78.

His wife was the daughter of Governor Leverett, and his wealth, his family and political connexions, gave him a great and leading influence in the colony. He left to his son Elisha, his politics, his popularity and his name, and most fully did he sustain them through the struggles between the people and the prerogative, that distinguish the succeeding administrations of the provincial government.

JOHN WALLEY

Succeeded Judge Danforth, in 1700, having received as Judge Sewall says all the votes of the council but one.

He belonged to the town of Bristol in the Plymouth Colony, and had been one of the Assistants in that colony from 1684, till its union with Massachusetts under the new charter.

Previous to that time he had resided in Boston, and removed to Bristol in 1680. He was named as one of An-

dros' Council for Plymouth, but does not appear to have acted with them.

In 1671, he became a member of the Ancient and Honorable Artillery, and in 1679, rose to be its commander. From this circumstance or some other, he had so high a reputation as a military man that he was selected to command the land forces in the Canada expedition which was sent against Quebec, in 1690, under the command of Sir William Phipps. This expedition was got up at great cost and sacrifice on the part of the colonists, and great hopes were entertained by them of its success. These however were all blasted. The expedition signally failed, and the colony, drained of its resources, or means of defraying the expenses it had thereby incurred, resorted, for the first time, to the pernicious custom of issuing bills of credit, by which the money of the colony at a subsequent period of its history became well nigh worthless.

Major General Walley published a journal of this expedition, which is contained in the appendix to Hutchinson's history of Massachusetts.

Mr. Walley on removing from Boston became one of the founders of Bristol, and among his associates were Nathaniel Byfield and John Saffin, both of whose names are connected with the history of the courts of Massachusetts.

A singular controversy arose between Mr. Saffin and Mr. Walley, in which Judge Byfield was also involved, an account of which may be found in Mr. Baylies' history of Plymouth Colony. This controversy, which affected the character of the two latter gentlemen, became a subject of arbitration before Lieutenant Governor Stoughton, Isaac Addington and John Leverett. By their award, Mr. Saffin was to make a proper acknowledgment to Mr. Walley, and the manner in which this was done, can only be appreci-

ated by transcribing his published communication. A single paragraph will serve to show in what spirit the award of the arbitrators was performed. "I confess I might have spared some poetical notions, and satyrical expressions, which I have used by way of argument, inference or comparison. Yet the sharpest of them are abundantly short of those villifying terms and scurrilous language which they (Walley and Byfield) themselves have frequently given each other both in public and private, generally known in Bristol."

This award was made in 1696, and as they both sat together afterwards upon the bench of the Superior Court, it is perhaps to be presumed that they became reconciled to each other, although, as will appear when I come to speak of Saffin, he was of a most irascible temper.

Judge Walley died in Boston, January 11, 1712, and I believe held his office till his death.

Of his character as a Judge, I have no means of speaking. He probably owed his appointment to the bench somewhat to his being a prominent man in Plymouth at the time of its union with Massachusetts, and his military services may have rendered him, in the mind of the Governor, deserving some reward.

JOHN SAFFIN

Succeeded Judge Winthrop, and came upon the bench in 1701. He was born in England, and came to Scituate about the year 1650, where he married a daughter of the distinguished Thomas Willett who was the first English Mayor of the city of New York. Previous to 1671, he had removed from Scituate to Boston, and for two or three years represented that town in the General Court. He was Speaker of the House of Representatives the year that the

charter was vacated.[1] About the year 1688, he removed to Bristol then in Plymouth Colony, and was an early proprietor of that town.

Upon the division of Plymouth into counties in 1685, Bristol became the shire town of the county bearing that name. And when the county officers were appointed under the charter of William and Mary, Mr. Saffin was made Judge of Probate and held the office until 1702.

In 1693, he was chosen one of the council and continued a member of that body until he was negatived by Governor Dudley, at the election in 1703. From his being negatived at the same time with Cooke, it is probable that he belonged to the popular party in politics, and this may perhaps account for his controversies with Byfield and Walley who enjoyed the favor of Governor Dudley. This too may account for his being left out of the commission to the Judges of the Superior Court, issued by Dudley upon coming into power. He had originally received his appointment directly from the council, after the death of Lieutenant Governor Stoughton, so that he held the office of Judge but for a short period.

From some memoranda left by Judge Sewall, Mr. Saffin's qualifications were not the best suited to the place which he was called to fill, and intimations are pretty distinctly given that he was guilty of tampering with Jurors, using influence to obtain improper testimony upon the trials of causes, and equivocating, when charged with dishonorable conduct in which he had been detected. How much of this was true, need not now be determined.

[1] By an order of the General Court, in May, 1686, Samuel Nowell, John Saffin and Timothy Prout were appointed a committee to take charge of such papers on the files of the Secretary as related to the charter and the titles to the lands of the colonists, which they had acquired by purchase of the Indians, or otherwise. (2d Ser. Hist. Col. viii. 180.)

That he was a self-willed and quarrelsome neighbor, was pretty strongly evinced in his controversy with Judge Walley and Colonel Byfield, to which reference has already been made.

His second wife was of the name of Lee, and for his third, he married a daughter of Colonel Byfield. For some cause he separated himself from his last wife, and for his conduct towards her he received from Cotton Mather a letter of sharp reproof just before his death.

His temper became peevish and irascible, and he seems to have lost the respect with which he had once been regarded.

He died July 29, 1710, at Bristol. His son Stephen Saffin was buried in Stepney Church yard, England, and his name acquired an immortality from the pen of the author of the Spectator.

ISAAC ADDINGTON

Was created Chief Justice by Governor Dudley, on his coming into the government, in 1702, and was the immediate successor of Chief Justice Winthrop. He was born in Boston, January 1645, and was admitted a freeman in 1673. In 1685, he was a member of the House of Representatives and Speaker of that body, and the following year was elected an Assistant. He does not appear to have had any share in the government between the revocation and restoration of the old charter, and must have acted with the popular party against the tyrannical assumption of power by Andros, for at the breaking out of the revolution, he was made one of the committee of safety, and clerk of the council. Upon the reorganization of the government, he was made Secretary of the Colony, and held that place until the arrival of the new charter, by which

he was appointed to the same office, and retained it till his death.

The office of Secretary was regarded as one of great importance in the colony and province, and the great length of time for which Mr. Addington was permitted to fill it, shows the high estimation in which he was held. Indeed all notices of him which have been preserved, represent him as having been a man of great integrity, but remarkable for his modesty. It is somewhat singular that while the other offices which he held are carefully mentioned in the notices which we have of him, none of them allude to his having held the place of Chief Justice of the Superior Court of the Province for nearly a year. It speaks but poorly of the rank with which the members of that Court were at that time regarded by the community.

He died March 19, 1715, at the age of 70. His daughter was the wife of Paul Dudley, Attorney General and afterwards Chief Justice of the Province.

Mr. Addington was connected with this court too short a time to affect its character, in any respect. He was bred a physician, and in the practice of his profession he was esteemed a useful man, but it is not difficult to conceive that in undertaking to expound the law, he found he had mistaken his proper sphere. He died however with the esteem of all classes, having been, in the words of a notice of his death, "a native of New England and a great honor to his country."

He was the uncle and patron of Addington Davenport, who, afterwards, sat upon the bench of the Superior Court for many years.

JOHN HATHORNE

Was the son of William Hathorne, the first Speaker of the House of Representatives, and was born in Salem,

August 4, 1641. In 1683, he was chosen a representative from Salem to the General Court, and the following year was elected one of the Assistants.

Upon the breaking out of the revolution in 1689, he was made one of the council of safety who assumed the government of the colony. He was named as one of the council in the new charter, and at the time of establishing a Court of Common Pleas for Essex County, was appointed one of its Judges, and is the second named in the commission. He held this office until his appointment to the Superior Court, which was in 1702.

He was, during this time, a member of the council, and in 1696, was one of the commissioners sent by the General Court to treat with the Eastern Indians. The same year he was directed by Lieutenant Governor Stoughton to proceed to Maine, and take command of an expedition against the French and Indians on the Penobscot, thereby superseding the gallant Colonel Church who had led the enterprise. Church was deeply chagrined at this unwarrantable conduct on the part of Lieutenant Governor Stoughton, and the event showed that Lieutenant Colonel Hathorne was unfitted for the place to which he had been commissioned. The expedition proved altogether unsuccessful, and returned ingloriously to Boston.

The records of the proceedings against the witches in Essex county, show that Judge Hathorne was very actively engaged as a magistrate in their prosecution, and shared deeply in the delusion that then prevailed.

He remained upon the bench of the Superior Court till 1712, when he was induced by increasing deafness to resign his place, and he died at the age of 76, on the 10th May, 1717.

It was more through the friendship of Governor Dudley and his political associates, than any peculiar fitness for

the place of Judge, that Mr. Hathorne was placed upon the bench, and it is therefore unnecessary to inquire how far he exerted any influence upon the character of the judiciary while he was connected with it.

JOHN LEVERETT

Was appointed Judge of the Superior Court in 1702. He was the grandson of Governor Leverett, and was born in Boston in 1662. In 1680, having been graduated at Cambridge, he entered upon the study of theology, and was subsequently licensed as a preacher. He preached for some years but changing his pursuit studied and practised law.

In 1700, he resided in Cambridge, and represented that town in the General Court, and was Speaker of the House of Representatives. After this he was chosen a member of the council, and seems to have enjoyed the public confidence in a high degree. In 1707, he was selected with Colonel Hutchinson and Colonel Townsend as commissioners to visit the army that had been sent against Port Royal, and had returned as far as Casco, without having accomplished any thing in their expedition. Little good seems to have resulted from this measure, for the whole enterprise was a signal failure.

While he was a Judge of the Superior Court, he was appointed Judge of Probate, by Governor Dudley, with whom he was a great favorite, and held his several offices of Judge of the Superior Court, Judge of Probate and Counsellor, until his appointment to the Presidency of Harvard College in 1708.[1]

[1] The vacancy which was filled by the appointment of Judge Leverett was occasioned by the death of President Samuel Willard. Cotton Mather was so confident of being selected as his successor, that he observed days of fasting, to solicit the divine direction, as to his accepting the office. This turned out to be a work of supererogation, as the place was not offered to him.

His administration of the affairs of the College formed a new era in its history, and under his wise and judicious course of measures, it assumed a rank that it had never before attained. He was eminent for his learning, prudence and sagacity and was distinguished for his firmness and energy of character. As early as 1680, he had become so well known abroad as a scholar that he was then made a member of the Royal Society. He possessed the somewhat incompatible qualities of mind of a sound theologian and an able statesman.

He died of the stone very suddenly, May 3, 1724, at the age of 62.

He is noticed by the Historian of the Ancient and Honorable Artillery Company, of which he was a member, and his character is there described in the language of a quotation borrowed by the writer. "For more than forty years he shone with near meridian lustre. The morning of his life being so bright that it shone like noon."

He must have held a high rank among the judges with whom he was associated, but it is chiefly in connexion with his place as President of the College that his fame has come down to posterity. The College was *then* regarded as the common property of the whole Province, and whoever promoted its prosperity was sure to win public favor and esteem.

JONATHAN CURWIN

Succeeded Judge Leverett in 1708. He was born in Salem, November 1640, and resided there during his life. He represented Salem in the General Court under the old charter, and by the new charter was appointed one of the council.

He was an active magistrate during the excitement in regard to witchcraft, and upon Major Saltonstal's retiring

from the bench of the special court of Oyer and Terminer created to try the persons charged with that crime, Mr. Curwin was appointed his successor.

Upon the organization of the Court of Common Pleas in Essex County, under the new charter, he was made one of its Judges, and remained upon that bench until his appointment to the Superior Court.

He held the office of Judge of the Superior Court until 1715, and died in June 1718, at the age of 77 years.

He was probably a merchant, as I find in the records of Essex County, that Jonathan Curwin with several other persons named in the record were authorized in 1686, "to sell drink without doors at Salem."

In the character given of him by Mr. Felt, it is said, "In his several relations as a member of society, and a christian, he richly deserved the confidence which was extensively granted him."

BENJAMIN LYNDE

Succeeded Judge Walley, and his commission as Judge, was published in Middlesex in July 1612, upon which occasion Judge Sewall in an address to the jury expressed the hope "that they would hereafter have the benefit of Inns of court education, superadded to that of Harvard College." He alluded to the fact of Judge Lynde having been a student at the Temple in London.

Judge Lynde was descended from a family of Dorsetshire, England, and was born in Boston, in 1666. He was graduated at Cambridge in 1686, and sustained the character of a fine scholar.

In 1692, he went to England, where he became a student of the middle Temple, and remained there till he was admitted as a barrister, and was the first regularly educated lawyer ever appointed to the bench of the Superior Court.

In 1697, he returned to Massachusetts with a commission as Advocate General of the Court of Admiralty for Massachusetts, Connecticut and Rhode Island. About the year 1699, he removed to Salem, where he continued to reside during the remainder of his life.

About the time of his removal to Salem, he married the daughter of the Honorable William Browne, a wealthy and influential gentleman of that place, one of the Judges of the Court of Common Pleas, and a member of the council.

Soon after this, he entered political life, and for many years, was a representative from Salem, in the General Court. In 1713, he was elected to the council, and continued a member of that body, until 1737.

Upon the resignation of Chief Justice Sewall, in 1728, Mr. Lynde was made Chief Justice of the Superior Court, and continued to hold the office till his death.

He died January 28, 1749, at the age of 79 years. His son, bearing the same name, was afterwards Chief Justice of the same court.

The time during which Judge Lynde was upon the bench is an important era in the history of the administration of justice in the commonwealth. As has already been remarked, he was the first educated lawyer who had been appointed to that place. Paul Dudley who was also an educated lawyer, held the place of Attorney General until his appointment to the Superior bench, and Judge Thomas, one of Lynde's associates, had been admitted to practice at the bar, and had taken the oath as an attorney, although his legal education was altogether defective.

An impulse seems to have been given to improvement in the forms of proceedings and the general course of administering justice, although it was still but in its infancy.

Unfortunately, we have few or no reports of the judicial opinions of the Superior Court at this period, and little more is known of the men who formed the judiciary then, than their names. And while the names and adventures of so many of his cotemporaries, fill a large space in the history of his times, little can be gathered of the services of Chief Justice Lynde during his long and useful life.

From a brief notice of him in the Boston Evening Post, published at the time of his death, I extract the following sketch of his character.

"Inflexible justice, unspotted integrity, affability and humanity were ever conspicuous in him. He was a sincere friend. Most affectionate to his relations, and the delight of all that were honored with his friendship and acquaintance."

Although he was not remembered as a military chief, or a partisan leader, he left behind him an enviable reputation as a scholar, a jurist, and a christian.

NATHANIEL THOMAS

Succeeded Judge Hathorne in 1712. I have found some difficulty in determining the time of Judge Thomas' birth or the name of his father. William Thomas, his ancestor, came into the Plymouth Colony in 1630, and settled in Marshfield. As this gentleman died in 1651, at the age of 77, it seems probable that the subject of the present article was the grand-son of the first settler of that name, and of this opinion is the historian of Plymouth.

There was a Nathaniel Thomas, who served in Philip's war, in 1675, and is said to have been the subject of this notice.[1]

[1] I am happy to express the obligation I am under to the venerable Dr. Thacher and the Honorable Mr. Mitchell, for the information furnished by them in relation to the subject of this notice. Since receiving communications

In 1686, he was admitted to the then Superior Court at Boston, and took the oath as an attorney of that court. He was then called "Capt. Thomas," as he continued to be in 1692, when he represented Marshfield in the General Court. Subsequent to this, he was honored with the office and style of the "Honorable Colonel Thomas," and continued ever after to be so designated in his public and official relations.

He seems early to have been connected with the administration of justice. In the Plymouth Colony he was one of the associates to hold county courts for the then county of Plymouth, in 1685. In 1689, Andros created courts of Common Pleas for these counties, but at the revolution, the "associate courts" were restored, and Mr. Thomas was placed at the head of those of Plymouth county, where he remained until the arrival of the new charter.

Under the new charter, he was appointed Judge of the Court of Common Pleas for the same county, and held that place till his promotion to the Superior Court. He was also Judge of Probate for the same county. He resided in Marshfield until his death, which took place at or about the time he left the bench in 1718, but he seems at one time to have resided awhile in Plymouth. He left a son Nathaniel, who resided at Plymouth, and was for

from them, and writing the text, I have discovered the following, which seems to determine the parentage of Judge Thomas.

In the action Matson vs. Thomas, before the Superior Court, in 1720, which involved the title to an estate which had been entailed, the lineage of the defendant is stated to have been William, the ancestor, Nathaniel, his son, who died leaving sons, William and Nathaniel, the latter being as I suppose, Judge Thomas of Marshfield.

This impression is strengthened by a recital in the statement of said case, wherein the son of William is called "Nathaniel Thomas, Gent." and the son of this Nathaniel is styled "Col. Nathaniel Thomas, late of Marshfield."

many years Chief Justice of the Court of Common Pleas for that county.

The family of Thomas, have ever held a distinguished rank, and as several of them have had the same sir name, it is not easy at this day to determine which of them were the persons intended when they have been spoken of in connexion with the passing events of the times in which they lived.

Judge Thomas of whom I have spoken in this article, was the ancestor of General John Thomas, whose name is well known in its connexion with our Revolutionary history.

From his long association with the courts, either as an advocate or judge, Colonel Thomas must have been familiar with the ordinary duties of his office, and was probably as well qualified for the place as his opportunities permitted.

He long enjoyed the public confidence in the many places of trust which he was called to fill, and his having been appointed by Governor Dudley, who knew the requisite qualifications for the place, as an associate with Lynde, and his being continued under a new administration, is strong evidence that he was a useful and reputable member of the Superior Court.

ADDINGTON DAVENPORT

Succeeded Judge Curwin, in 1715. On his father's side he was descended from Richard Davenport, who was the commander of the castle in Boston harbor, and was killed in 1665, by lightning, while sleeping by the side of the magazine, from which he was separated only by a simple wainscot.

On his mother's side, he was connected with Chief Justice Addington, who was his mother's brother.

His parents died when he was young, and his uncle Addington having adopted him, sent him to Harvard College where he was graduated in 1689. In a class of fourteen his name stands the fourth in the catalogue, from which it would seem that his family held a high rank in the colony.

In 1690, he went to England, from whence he returned and established himself in business, and was elected the clerk of the first House of Representatives under the new charter in 1692. In 1695, he was appointed clerk of the Superior Court, and held the office about three years. He was then appointed clerk of the Court of Common Pleas, for the county of Suffolk, and Register of Deeds for the same county. He held the two latter offices until 1714, when he was elected a member of the council, of which body he continued to be a member for seventeen years.

At the time Mr. Davenport was elected to the council, a struggle was going on in the province between the friends and opponents of a public bank. The former party, at length, prevailed, and a loan of 50,000 pounds in bills of credit was raised and placed in the hands of five trustees to be lent out to the inhabitants of the province on an interest of five per cent. Mr. Davenport was one of these trustees, and those associated with him were Andrew Belcher, Thomas Hutchinson, Edward Hutchinson, and John White, who were among the leading and most influential men in the province.

His uncle Addington died in 1715, whereby the office of Secretary of the province became vacant, and thereupon Paul Dudley and Mr. Davenport were appointed commissioners to keep the seal and records of Massachusetts Bay.

He continued upon the bench till his death in April 1736, at the age of 66. For about a year and an half,

however, before his death, his health was so feeble that he was unable to perform much, if any official duty.

He seems to have enjoyed a great share of popular favor if we may judge from the frequency of his being elected to office, and the sketches of his character that have come to us from his cotemporaries certainly would seem to justify the favor he enjoyed. "As a judge, he feared God and regarded man. He was eminent for his religion, prudence, modesty and moderation, which made his friendship valuable. His temper was grave, yet sociable, withal, and that rendered his conversation agreeable. In his private relations of a husband, father, master and neighbor, he was very exemplary and desirable."

He left three children, one of whom has already been mentioned in this work. The other two were daughters, and one of them married Colonel William Dudley of Roxbury.

EDMUND QUINCY

Came upon the bench at the time of the appointment of Samuel Sewall to the place of Chief Justice in 1718. The sketch of the character of this distinguished man, as given by Elliott, is so full, that I have attempted little more than a transcript of it, although I am not unaware how meagre this must appear to such as are familiar with the history of Judge Quincy. He was born in that part of Braintree which is now called Quincy, and was the son of Edmund Quincy, the second of the name. His mother was a daughter of the distinguished General Gookin.[1] He was graduated at Cambridge, in 1699, and

[1] General Gookin was among the most eminent men in the colony. He was born in England, and came to America, in 1644, when he settled in Cambridge. He was at different times one of the assistants—superintendent of all the Indians, licenser of the Press, and Major General of the Colony. He was at the head of one of the political parties in the colony in which he manifested an un-

in order, in the catalogue of that year, because of the rank of the family of his father the Honorable Joseph Dudley, who was afterwards Governor of the province. After being graduated, he commenced the study of the law, but soon went to England, where he completed his studies at the Temple. In 1702, he returned to Massachusetts, with a commission as provincial Attorney General and held the office until his appointment to the bench.

The commission which he received in England was from Queen Anne, but it was thought better that he should be appointed by the Governor and council here than attempt to exercise a doubtful authority, though derived directly from the crown. He was accordingly commissioned here without publishing the commission which he had received from the Queen.

As has been remarked in another part of this work, a controversy arose, at an early period, between the Governor and House in regard to the appointing power to fill the office of Attorney General. Every attempt, however, of the House to exercise the power was resisted by the Governor until 1716, when Lieutenant Governor Taylor yielded the point, and the House wisely elected Mr. Dudley who had hitherto held the place by executive appointment.

He represented his native town, for some years, in the General Court, and in 1710, was elected to the council for Sagadahoc, a district in Maine, which by the charter was entitled to be represented at the Council Board. He was re-elected in 1720, and 1721, but it having been suggested that he owned no lands in that district, the House undertook to investigate his right to a seat at that Board. He resisted this inquiry, and an angry and memorable controversy arose, the particulars of which would fill too large a space for a work like this.

In politics, he was a friend of Governor Shute, but opposed to Governor Belcher. The consequence of this was, that in 1739, when Mr. Dudley, who was then a member of the House, was elected Speaker, he was negatived by the Governor and John Quincy was elected in his place.

Besides performing his judicial and political duties, Mr. Dudley became a learned naturalist, and an able theologian, in both of which departments he wrote and published works, and such was his reputation for scholarship that he was elected a member of the Royal Society in London.

In January 1745, he succeeded to the place of Chief Justice of the Superior Court, upon the death of Chief Justice Lynde, and held that office till his death, January 21, 1751, when he was succeeded by Stephen Sewall.

He was a benefactor to Harvard College, and by his last will, made provision for an annual Lecture to be delivered before the College upon some one of four prescribed subjects. In his religious sentiments he was among the straightest of the strict, especially towards the close of life.

But it is chiefly with his character as a judge that we have to do, and it is upon this that we can dwell with great satisfaction. Indeed there is something cheering to a generous mind, while engaged in the incessant and toilsome duties of judicial life, in the consciousness that, although few can appreciate the value of his labors, posterity will do justice to his memory, when the noisy, popular politician of the day, shall have passed away into oblivion. Judge Dudley was a thorough and accomplished lawyer, and to his connexion with the Bar and the Bench may be traced many of the reforms which obtained in the practice of the Courts and the mode of administering justice. He had cotemporaries, among whom was Mr. Read, whose influence was coincident with his own, and we seem to be

entering a new field as we approach the period distinguished by such names as Paul Dudley, Read, Gridley, Thacher, Pratt, and others of their cotemporaries who were entering upon the stage of professional life as Chief Justice Dudley was passing from its more active duties.

Whatever may have been the influence of Judge Dudley in raising the character of the judiciary, and improving the administration of justice in Massachusetts, it will be found as we proceed, that it was principally through the influence of the members of the bar that the reform to which I have alluded was effected.

But I would do justice, as far as I am able, to the memory of Chief Justice Dudley, and cannot perhaps accomplish the purpose better than by transcribing from Elliott, the sketch of his character as given by Chief Justice Sewall who was his successor. "It was on the Bench he shone with the greatest lustre. Here he displayed his admirable talents, his quick apprehension, his uncommon strength of memory, and extensive knowledge; and at the same time his great abhorrence of vice, together with that impartial justice which neither respected the rich, nor countenanced the poor man in his cause." "When he spoke it was with such authority and peculiar energy of expression, as never failed to command attention, and deeply impress the minds of all who heard him. And his sentiments of law and evidence, in all cases before the court, had generally a determining weight with those who were charged with the trial of them."

A power such as is here ascribed to Mr. Dudley, would certainly be a dangerous one unless it were coupled with upright intentions and a disciplined judgment, as well as adequate resources of learning.

The respect that is attached to the very place he occupies, gives to the arguments and opinions of a judge, the

weight of almost irrefutable authority, and it is only when they are dictated by a sound mind and an honest heart that they become as they may be, one of the strongest safeguards of the people's rights. In regard to Judge Dudley, it is added that "thus while with pure hands and an upright heart, he administered justice in his circuit through the province, he gained the general esteem and veneration of the people." A reputation truly enviable, but one to which he seems to have been justly entitled as a judge, whatever feelings of animosity may at any time have been entertained towards him as a politician.

JOHN CUSHING

Came upon the bench in 1728, upon the promotion of Judge Lynde to the office of Chief Justice. He was born in Scituate in 1662. Little, I believe, is known of him beyond his connexion with the courts. I have referred for dates mostly to the elaborate history of the town of Scituate which was prepared and published by a late accurate and lamented antiquary, Mr. Dean.

In 1702, Mr. Cushing was appointed Chief Justice of the Court of Common Pleas for Plymouth county, which office he held until 1728. In 1710, he was elected to the council, of which body he continued to be a member until 1728.

He remained upon the bench of the Superior Court from 1728, to 1733, when his name was omitted in the commission which was then issued to the other members of the court. Although he was seventy one years old when he was left out of the commission as judge, and of course must have been somewhat advanced when he first came to the bench of the Superior Court, he is nevertheless said by a cotemporary to have been "the life and soul of the court." By this is probably meant that his

cheerfulness gave life and vivacity to its sessions, for I do not find that he was educated beyond what was requisite for the duties of a highly respectable walk in private life, and of course he could not have held a high rank for learning in comparison with some of his associates upon the bench. Judge Cushing died in 1737, at the age of 75. His place of residence was in Scituate, and from him descended two other Judges of the same court, John and William Cushing, and Nathan, another of the judges of the court, was his nephew. From him also has descended the Honorable James Savage, to whose labors as an antiquary, I am happy to acknowledge my obligations, in the prosecution of these researches.

JONATHAN REMINGTON

Was the successor of Judge Cushing, and his commission as such was published at Cambridge in July 1733. He was born in Cambridge, and was graduated at Harvard College in 1696. He was appointed a Judge of the Court of Common Pleas for Middlesex in 1729, and in 1731, was made Judge of Probate for that county. He was somewhat connected with political life, and sat for some years at the council board. But less is known of him either as a judge or civilian than his merits in these relations seem to deserve, or than there would have been, had he mingled in the strife of party instead of faithfully pursuing the unpretending path of his official duties.

He died September 20, 1745, and at the next term of the court at Charlestown, Chief Justice Dudley in a charge to the Grand Jury, pronounced an eulogy upon his character.

In this he did justice to the high moral and religious attainments of his late associate, his diligence and fidelity in the performance of his official duties, and his amiable

and excellent qualities in private life, and uttered in becoming terms the sentiments of respect and esteem which he cherished for the memory of his friend.

Judge Remington was the father of Mrs. Ellery, the wife of one of the immortal band whose names are affixed to the Declaration of American Independence.

RICHARD SALTONSTAL

Was the successor of Judge Davenport, and was commissioned December 29, 1736.

He was grand-son of Major Saltonstal who was one of Special Court of Oyer and Terminer in 1692. He was born at Haverhill June 4, 1703, and by birth was connected with some of the best families in the Province. His education and associations early familiarized him with the refinements of polished society, and his deportment and address were characterized by the graceful urbanity of a gentleman of the old school.

He was graduated at Cambridge in 1722. Not engaging in any regular profession, he indulged his taste for military pursuits, and at the early age of 23, held a commission as Colonel of the provincial troops. He did not lose this taste even after his promotion to the bench. He was the commander of the Ancient and Honorable Artillery Company in 1737, and afterwards continued a member of that corps.

He held the office of Judge till his death, which took place October 20th, 1756.

His place of residence was Haverhill, where he lived in a generous and hospitable style, and was surrounded by ardent friends to whom he was endeared by his many amiable and excellent qualities.

Notwithstanding he never pursued any systematic course of professional study, he was a scholar and a man

of learning, and possessed many of the best qualities of a judge, although destitute perhaps of the legal acquirements which are in a measure essentially necessary to the satisfactory administration of justice.

Among his descendants is the Honorable Leverett Saltonstal, one of the Representatives in Congress from Massachusetts.

We ought not to omit in this connexion the name of JOHN STODDARD. Although he never sat upon the bench, he was appointed a member of the court, June 24, 1736, and probably declined the office. He was born in 1682, February 17th, and was graduated at Harvard College in 1791. He studied no particular profession, but engaged early in public business. Among the offices which he held were those of Colonel of the Militia, Judge of Probate for Hampshire, and Judge of the Court of Common Pleas for that county, of which court he was Chief Justice during the last ten years of his life. In 1713, he was sent by the province to Quebec for the purpose of redeeming the American captives who had been made prisoners by the French and Indians, and in 1725, was a commissioner to treat with the Indians in Maine.

For many years he held a seat at the Council Board, until he preferred a seat in the other branch, when he was chosen to represent his native town, Northampton, in the General Court. In his politics he was a "prerogative man," and consequently was not a favorite of the people, although his enemies accorded to him the possession of an upright heart.

He died of apoplexy, June 19, 1748, while attending the General Court as a representative in that body.

He was a leading influential man in his day, a safe Counsellor and an efficient public officer, and in the va-

rious places which he was called to fill, he performed his duties with honor and success.

THOMAS GREAVES

Was appointed, ad interim, to supply the place of Judge Quincy. He was commissioned in January, 1738, and the tenure of his office was "during his (Mr. Q.'s) continuance in the service of this Province at the court of Great Britain."

He was born in Charlestown, in 1684, and was graduated at Cambridge in 1703. His name stands the fifth in the catalogue of the class of that year, at the head of which, is the name of Spencer Phipps, afterwards Lieutenant Governor of the Province, from which circumstance it would seem that the family of Judge Greaves was very respectable in point of rank.

He studied and practised medicine as a profession, and resided in Charlestown.

His first connexion with the courts that I have discovered, was in 1731, when he was appointed Special Judge of the Court of Common Pleas for Middlesex, "in all causes wherein the commissioners for the £100,000 loan for said county are concerned."

He was next made Special Judge of the Court of Common Pleas for Suffolk, in 1735. In 1737, he was appointed Special Judge of the Superior Court for the county of Essex.

In the mean time he was appointed one of the standing Judges of the Court of Common Pleas in Middlesex, in 1733, and held the office till his appointment to the Superior Court in the place of Judge Quincy. He did not however lose all his connexion with the Common Pleas by this promotion, for Judge Foxcroft, who was appointed his successor, was commissioned to hold his office "while

Thomas Greaves remains one of the Justices of the Superior Court."

Judge Greaves retained his place upon the Superior bench, until the death of Judge Quincy, and the appointment of his successor. He was then, 1739, restored to his office in the Court of Common Pleas, and held the place till his death, June 19, 1747.

It is difficult to discover why the subject of this notice was so frequently called to act in a judicial capacity, when his professional studies and pursuits could not have had any direct tendency to fit him peculiarly for such duties. Indeed where the influence of family and of political subserviency to power often outweighed the claims of merit, it is not surprising that we should find men occupying places of honor and trust for which it is not easy to detect their fitness or qualifications.

Such was the case under the administration of the Royal Governors of Massachusetts, and the judiciary among other departments of the government, offered one of the spoils of office which were distributed at times among the favorites of the men in power.

Thomas Greaves, supposed to be the father of the Judge, was an active magistrate in Middlesex, and his name ought to be preserved as one of the few who dared to denounce the delusion of witchcraft, and to raise his voice against the barbarous proceedings of Governor Phipps's special court in 1692.

The connexion of Judge Greaves with the Superior Court was so brief, that he could not have left any impression upon its character, and it has been rather from a wish to preserve his name from oblivion than in the expectation of giving any interest to the sketch, that I have thus noticed him.

STEPHEN SEWALL.

Was appointed Judge of the Superior Court upon the death of Mr. Quincy, in 1739. He was born in Salem, in 1702, and was the son of Stephen, who was a brother of Chief Justice Samuel Sewall, and for many years Clerk of the Courts and Register of Deeds in Essex. His mother was a daughter of the Rev. Jonathan Mitchell of Cambridge.

He was graduated at Cambridge, in 1721, and then engaged in keeping school in Marblehead, where he remained until he was appointed a Tutor in Harvard College, in 1728. He remained in this office till his appointment to the Superior Court. In the mean time however, he studied theology, and preached occasionally, but was never settled over any church.

Upon the decease of Chief Justice Dudley, Mr. Sewall, though not the senior judge, was appointed his successor. This was in 1752, and he continued at the head of the court, till his death, in November 1760.

It was while he was Chief Justice, that the application for "writs of assistance" which forms so important an epoch in the History of Massachusetts, was made to the Superior Court. The death, however, of Judge Sewall before the question came on for argument, was regarded by the popular party as peculiarly unfortunate, as it was generally understood that his opinion was adverse to the application.

Judge Sewall died a bachelor, but the affections of a generous nature, were not thereby wasted, but expended themselves in acts of benevolence and kindness to those around him to a degree that bordered upon injustice to himself and his creditors.

In the character given of him by different writers he is uniformly represented as "a distinguished scholar," a man

"of honor and spirit," "a knowing lawyer and an upright judge."

In the collections of the Massachusetts Historical Society there is a letter of the Rev. Charles Chauncy, written in 1768, in which he purports to give "a sketch of eminent men in New England." Out of some thirty five, mentioned by him, Judge Sewall alone, of those who had been members of the Superior Court, is honored with a notice.

In speaking of him, Dr. Chauncy says, "Quickness of apprehension and a capacity to look thoroughly into a subject, were united to him in the highest degree I ever saw in any of my acquaintance. One could scarce begin to mention a train of thought, but he would at once perceive the whole of what was going to be said; and if it was a disputable point, had in readiness whatever was proper to be said in answer." "He was too benevolent in his make for his circumstances."

The consequence of this trait in Judge Sewall's character, was that he died insolvent.

His nephew, the distinguished Jonathan Sewall, who was appointed his administrator, made an appeal to the legislature, for a grant of money with which to discharge the debts of his uncle, and the ill success with which he met in his application was one of the causes which alienated him from his former political friends, and induced him to unite with the government party.

What the claims of Judge Sewall to a place upon the bench were, which led to his being promoted at once from a tutorship in college to the Superior Court, it is not easy now to determine. His education and pursuits hitherto had not been such as to fit him for the place, and respectable as were his family connexions, he does not seem to have taken any prominent stand as a politician, or even as

a divine. His appointment therefore, while such men as Read and Gridley and Dana were at the bar, is pretty good evidence, either that the proper qualifications for the office were but little regarded by Governor Belcher, or that it was resorted to as an expedient often adopted, to quiet the claims of rival candidates, by selecting some third one of unexceptionable qualities. In the selection of his successor as Chief Justice, the influence of political action was too obvious to be concealed, and, if any thing were necessary to prove the proposition, shows how essential to the liberties of a people is the independence of their judiciary of the political factions which so often divide a community.

Whatever may have led to the appointment of Judge Sewall to the bench, it is the concurrent testimony of his cotemporaries that he faithfully, ably and honestly performed its duties, and died universally honored and lamented by the Province.

NATHANIEL HUBBARD

Was appointed Judge, January 24, 1745, simultaneously with Benjamin Lynde, one as the successor of Paul Dudley upon his being promoted to the place of Chief Justice, and the other as successor to Judge Remington.

I have found no little difficulty in tracing the history of Judge Hubbard, although he held many important offices under the provincial government.[1]

He is said by Hutchinson to have been a grandson of the historian of Massachusetts, the Rev. William Hubbard. For many years he was a resident in that part of the town of Bristol, then the shire town of Bristol county, that retains the Indian name of Poppysquash, where his tomb is

[1] For the principal information upon this subject I am indebted to the Honorable Mr. Mitchell, whose aid I have before had occasion to acknowledge.

now seen. When he first removed there it does not appear.

From 1728, till his promotion to the Superior Court, he was a Judge of the Court of Common Pleas for the county of Bristol, and in 1729, was appointed by Nathaniel Byfield Deputy Judge of Admiralty for the county of Bristol in Massachusetts, the colony of Rhode Island and the Narraganset country.

He was on one occasion appointed special Judge of the Superior Court in 1737, to act in a case where the town of Boston was a party, and for many years was a member of the council, being in 1741, in the words of Hutchinson "the oldest counsellor for the county of Bristol."

He left the bench of the Superior Court in 1747, which was probably the year of his death.

Hutchinson, who knew Judge Hubbard, describes him as "a gentleman of amiable character, who filled the several posts he sustained with applause." And, in another connexion he remarks, that "he shone with peculiar lustre and inherited his grand-father's virtues, especially that amiable spirit of benevolence. He was of the council and one of the Justices of the Superior Court too late in life for his country to reap any long benefit."

BENJAMIN LYNDE,

The second of the name, came upon the bench in 1745, He was the son of Chief Justice Lynde, and was born at Salem, in 1700. He was graduated at Cambridge, in 1718. I infer that he did not study any profession, for I find him, soon after, the naval officer of the port of Salem, from which office he was removed by Governor Burnett in 1729, because, as a member of the House, the previous year, he voted contrary to the Governor's wishes on the subject of his salary.

In 1734, he was appointed a special justice of the Court of Common Pleas for Suffolk, and in 1739, was made one of the standing Judges of that court for the county of Essex. He held the office of Judge of the Common Pleas until his promotion to the Superior Court.

In 1766, a controversy having arisen between the House of Representatives and the Governor as to the right of the Judges to sit as members of the council, Judge Lynde, who had long been of that body, declined re-election as counsellor, and thus escaped the odium which fell upon other members of the court. He was, in fact, liberal in his political views, and rather inclined to the side of the people.

In 1770, the trials of Captain Preston and the British soldiers who were concerned in what is known as the "Boston Massacre," came before the Superior Court. It was an occasion of the deepest interest to the province, to the government and the cause of justice. The trial was to take place in the very scene of the event which had roused a whole nation. The jurors who were to try the cases, were drawn from among the very populace who had been fired upon by a hated and dreaded soldiery, the neighbors and fellow citizens of the murdered victims, as they were regarded.

In consequence of Governor Burnett having returned to England, Chief Justice Hutchinson, who was also Lieutenant Governor, was left at the head of the government, whereby Judge Lynde became the presiding judge on that occasion. The result of these trials is a proud memorial of the purity of the administration of justice in our commonwealth, and of the extent to which jurors may be trusted even in times of popular excitement.

Not only did these trials evince impartiality and independence on the part of the court, and jury, but no less so a love of justice and a self devotion to her cause on the

part of the bar. Eloquent and able advocates were found ready to hazard their popularity, and, it might be, their very means of livelihood, in defence of right, and the verdicts which were returned under such influences, have found a hearty approval in the unbiassed judgment of posterity.

Upon Chief Justice Hutchinson's being raised to the place of Governor of the province, Judge Lynde became his successor. He however continued to hold his seat as Chief Justice but a short time. The controversy coming on in regard to the payment of the judges, salary by the crown, Judge Lynde was unwilling to engage in it, and resigned his seat upon the bench.

He was now 72 years of age, but was appointed the same year Judge of Probate for Essex, which office he held till his death. He died in his 81st year, October 9, 1781. His daughter married Lieutenant Governor Oliver, and to her he left a farm in Brimfield, "which was part of 1000 acres given by the Indians to her mother's great great grand-father, the Rev. John Elliot, in 1655, as a token of their love for teaching them the good knowledge of God."

Judge Lynde had the reputation of being a learned man, and was greatly esteemed for his private virtues and his public services.

JOHN CUSHING,

Second of the name, and son of the former Judge, was the successor of Judge Hubbard in February 1747.

He was born in Scituate in 1695, and ever resided there while he lived. As early as 1721, he represented that town in the General Court, and from 1746, to 1763, was a member of the council.

He held the office of Judge of Probate of Plymouth county from 1738, to 1746, and during the same time was

Judge of the Court of Common Pleas in the same county.

He resigned his seat upon the bench of the Superior Court in 1771, and died in 1778, at the age of 82 years.

He was undoubtedly a respectable magistrate, but I can learn little of his qualifications for the place of Judge, which he filled for twenty four years.

The family to which he belonged, have been distinguished in the judicial annals of the commonwealth, having furnished four Judges of the Superior and Supreme Courts. But it is chiefly through the eminent rank and reputation of Chief Justice William Cushing, who was a son of John the 2d, that the name of the family has been so intimately associated with the history of our courts.

CHAMBERS RUSSELL

Was appointed Judge upon Stephen Sewall's being promoted to the office of Chief Justice. He was commissioned April 6, 1752. He was the son of Honorable Daniel Russell, and great grand-son of the Honorable Richard Russell who settled in Charlestown, in 1640. He was born at Charlestown, in 1713. He was graduated at Cambridge, in 1731, and soon after settled in Lincoln, then a part of Concord.

In 1747, he was appointed Judge of the Court of Common Pleas for Middlesex, and, the same year, was made Judge of Vice Admiralty over New Hampshire, Massachusetts and Rhode Island. His commission as Judge of Admiralty, was under the great seal of the High Court of Admiralty in England. For some reason the original commission, which run merely during the pleasure of the crown, was renewed in 1761, and in 1762, but Mr. Russell continued to hold the office till his death.

In the preface to "Novanglus" Judge Russell is called of Lincoln, and his name is introduced there, on account of

his connexion with Jonathan Sewall, to whom he was a most efficient but disinterested patron. He not only took young Sewall into his family, but instructed him in law, furnished him with books, and introduced him into practice as a lawyer. From the manner in which he is spoken of by President Adams, I should infer that Judge Russell was a practising, educated lawyer before his appointment to the bench, but I have not been able to ascertain if such was the fact. He represented Concord several years in the General Court and was chosen to the council in 1759.

He died in England, at Guilford, Surry, November 24, 1766, after an illness of only three days.

In a notice of him contained in the Boston Evening Post, published at the time of his death, he is described as having been "a gentleman whose upright and truly amiable character in public and private life, had justly endeared him to all who had a knowledge of him, but more especially to those who were favored with his particular friendship and intimacy."

PETER OLIVER

Succeeded Judge Saltonstal in September, 1756. He was a native of Boston, and brother of Lieutenant Governor Andrew Oliver. He was born in 1712, and was graduated at Cambridge, in 1730. He did not study any profession, but turned his attention to the cultivation of general literature and the fine arts.

He was a handsome writer, both of poetry and prose, and possessed a fine literary taste. He had a decided fondness for historical research, and among other materials which he collected for an American history, was a copy of Hubbard's History, which he transcribed with his own hand.

Middleboro' was his place of residence, and he had been

eight years a Judge of the Court of Common Pleas, when he was appointed to the Superior Court.

He expected to have been promoted to the place of Chief Justice when Governor Hutchinson left the bench, but did not obtain the appointment until the resignation of Chief Justice Lynde in 1772.

He entered upon the duties of the office at a most critical and trying time. The salary heretofore paid the incumbent by grants of the General Court had only been £200. By the new modification of the charter, the salaries of the judges were thereafter to be paid by the crown, and that of the Chief Justice was increased to £400 per annum. Yet such was the determined hostility of the people to this independence of the legislature on the part of the Judges, that Oliver alone dared to accept his salary from the crown. The House had passed a resolution calling upon the Judges to determine from which they would receive their salaries, the province or the king. Four of them had declined accepting any grant except from the General Court, but Oliver not only expressed his intention to accept the salary offered him under the new arrangement, but defended his right so to do, with great firmness and ability. He insisted that his former salary was altogether inadequate to his support; that his estate had been greatly impaired while he had held the office, and that he had been prevented from resigning only by the encouragement held out to him that his salary would be raised, and that as his Majesty had graciously made the grant he dare not refuse to accept it. This resolution of the Chief Justice was communicated to the House in answer to the inquiry in 1774.

As might have been supposed, the answer of Judge Oliver, in the excited state of feeling and alarm on the part of the House, at the encroachments of the crown, was

wholly unsatisfactory and they at once proceeded to impeach him before the council. Articles were drawn and exhibited against him, but as the Governor was resolved to protect him at all events, no trial was had upon the articles.

The odium in which the Chief Justice was held for thus daring public sentiment, was not confined to the House, but was felt through the community. Juries refused to be sworn, or to proceed to business until assured that the Chief Justice was not to be present at the term of the court for which they had been summoned, and this took place in Worcester, Middlesex and Suffolk.

The situation in which Judge Oliver found himself was not only embarrassing to himself, but to his associates upon the bench. He complained that they did not sustain him, and towards some of them, at least, he entertained no very friendly feelings. They on the other hand complained of duplicity on his part, and though he retained the confidence and friendship of the Governor, his residence in the Province must have been any thing but pleasant. His official conduct impeached, his friends alienated, his usefulness destroyed, and public confidence in him at an end, he left the Province in 1776, when the troops evacuated Boston, and carried with him the feelings of bitter hatred towards the country which he cherished through life and instilled into the minds of his children. Upon leaving Boston he went to England, where he died at Birmingham in October, 1791, aged 79. He was the last chief justice of the Superior Court under the king, and if we were to study his character from the papers of the day it would be difficult to form an accurate estimate of his true merits. It was enough that he was opposed to the popular will, to be regarded with odium as a traitor to his country. No allowance was made for the fact that he was a loyalist

from his earliest associations, and that his education and rank in life tended to confirm these impressions. And when he dared openly to resist the known will of the legislature, he encountered obloquy and reproach in unmeasured terms.

But had he lived in other times, his name would have come down to posterity with honor. His zeal for the prerogative, would have been remembered as loyalty, and his obstinacy in maintaning his purpose, as true courage and commendable firmness. His learning, his fine and cultivated taste, and his association with men of letters, would have rendered him justly conspicuous among the eminent men of his time.[1]

As an evidence of the different estimate in which he was held among his countrymen and abroad, we may remark that while no honorary degree was ever conferred upon him by an American College, he was honored by the degree of LL. D., from the University of Oxford.

In this notice of Judge Oliver thus far, I have been compelled to regard his political rather than his judicial character. The interest that might otherwise have been felt in the question of his capacity for the duties of the place he filled, was merged in the political questions of the day. But from the nature of the charges urged against him, it may fairly be inferred that his course as a judge would, under ordinary circumstances, have merited the public confidence and respect. No one can be unconscious of

[1] A writer in the Massachusetts Historical Collections in speaking of Judge Oliver says, "His seat was on Namauskeag river, a tributary to the Cohannet, where the native grove under his forming hand became such an one as Thompson found in the shades of Hagly, but the groves, the gardens and the mansion house are no more." The mansion house was destroyed by fire.

The families of Judge Oliver and Copely the painter, father of Lord Lyndhurst, were connected by marriage. (2d Ser. Hist. Col. iii. 169.)

the prejudice under which the names of most of those who were upon the bench at the Revolution, have come down to us, and however willing he may be to do justice to their memories, the means of doing this are not now accessible. Various causes combined to render Chief Justice Oliver and Chief Justice (afterwards Governor) Hutchinson particularly odious to the people, but it would be entering a new field if I were to attempt to trace out these causes, which would be found in the political agitations of the Province.

THOMAS HUTCHINSON

Was appointed Chief Justice, while he was Lt. Governor, and succeeded Chief Justice Stephen Sewall, December 20, 1760. He was the son of Thomas Hutchinson, many years a member of the Council, and a highly respectable and influential merchant of Boston and was born September 9, 1711. He was graduated at Harvard College in 1727.

After leaving college he engaged in mercantile business which he afterwards abandoned for the study of law and politics, especially the latter, in which he early embarked. He represented Boston in the General Court, several years, and was Speaker of the House from 1746 to 1749, when he was elected a member of the Council.

He was appointed a Judge of the Court of Common Pleas for the county of Suffolk, in 1752, and, the same year, succeeded his uncle Edward Hutchinson, who had died that year, as Judge of Probate for that county.

In 1758, he was commissioned as Lieutenant Governor of the province, and resigned his seat upon the bench of the Common Pleas in favor of his brother Foster, but retained his office as Judge of Probate.

Upon Governor Bernard's leaving the province in 1769, the Lieutenant Governor became the acting chief magistrate, on which occasion he resigned his office of Judge of Probate in favor of his brother Foster, but continued to hold the office of Chief Justice, although he ceased to perform its duties.

In 1771, he was made Governor, and of course his commission as Chief Justice was superseded and he was succeeded by Chief Justice Lynde.

He held the office of Governor till 1774, when he was succeeded by the last Royal Governor, Gage, and left Massachusetts in June 1774, never more to return.[1] He went to England, where he became a pensioner of the crown, and died at Brampton near London, June 3, 1780, having experienced the fickleness of "Princes' favors," in the neglect with which he was treated during the last years of his life.

Were I to attempt to give an outline of the personal and political history of Governor Hutchinson, it would require a wider departure from the original design of this work than could easily be justified.

It would cover not only a long period of time, but a period the fullest of incident of any which our history furnishes.

[1] As a mark of respect when he left the Commonwealth, a complimentary address was forwarded to him signed by many of the leading members of the bar. This measure gave great offence to the people, and some who had been parties to it publicly retracted their expressions of approbation of the Governor's character. The following were among those whose names were appended to this address.

Robert Auchmuty, Jonathan Sewall, Samuel Fitch, Samuel Quincy, William Pynchon, James Putnam, Benjamin Gridley, Abel Willard, Andrew Cazeneau, Daniel Leonard, John Lowell, Daniel Oliver, Samson Salter Blowers, Shearjashub Bourn, Daniel Bliss, Samuel Porter, David Ingersol, Jeremiah D. Rogers, Daniel Gorham, Samuel Sewall, John Sprague, Rufus Chandler, Thomas Danforth and Ebenezer Bradish. (Bos. Eve. Post.)

It is by no means an easy task to do justice to the character of one towards whom a feeling of such bitter hostility prevailed, as towards Governor Hutchinson. Whoever should be able to separate his character as a judge from that as a politician, would do much to rescue his name from the odium in which it has come down to us, and help to do justice to the memory of a man who unhappily for his own fame, was permitted to reach the summit of his loftiest ambition.

Few who sat upon the bench in the last century, were more deserving commendation than Judge Hutchinson. His character, in this capacity, was irreproachable. His learning, even in the science of the law, was highly respectable, and, when we consider his early education, was indeed remarkable. He possessed great clearness of thought, and excelled in that most difficult property of a good judge, a clear and intelligible statement of the case upon which he was to pass. It is a traditionary anecdote, that after listening to the charges given by his associates, juries were in the habit of remarking, when Hutchinson rose to address them, that "now we shall have something which we can understand."

In private life, he had those qualities which always command respect and esteem. He was polite, affable and winning in his manners, abstemious, industrious and regular in all his habits, and upright and honest in all his dealings. He was a friend to literature and a patron of the arts.

No one can read his history of Massachusetts without feeling an unqualified respect for his memory as an historian. The laborious research, the faithfulness and accuracy of detail, and the degree of candor, even in regard to what most intimately concerned himself, which his volumes evince, are enough to commend them to all who

wish to study our early history, even though they possess few graces of style or philosophical reflections to attract the reader.

That he should have viewed the political events and actors of the period in which he lived, in a different light from those who have undertaken to collect the history of his times from the papers of the day, is not surprising. But whoever reads even the third volume of his history, which embraces the period of his own administration, and remembers the losses and indignities he suffered at the hands not only of the populace, but of their political leaders, his favorite measures all thwarted, his house ransacked and his papers destroyed by a mob, and himself the object of the hate of his enemies and neglect, not to say ingratitude, of his friends, cannot fail to acknowledge the fairness of his narrative and the integrity of his motives. In this respect at least, Massachusetts owes him a lasting debt of gratitude. Others may write her history in a more attractive form, but for their facts they must to no small extent depend upon the results of Hutchinson's labors.

In his manners, he had the ease and grace of a courtier, and if his enemies may be believed, not a little of a courtier's art and duplicity.

In his official character, he had great readiness and capacity for business, and was faithful and laborious in the performance of his duties.

He was a fluent and graceful speaker, a vigorous writer, and a respectable scholar.

The times in which he lived, may have contributed to make him what he was, but had he lived at almost any other period of our history, with the same industry and application of his powers, his fame would have survived as that of an useful, honorable and honored man.

But the passion that blighted his private happiness, and sullied his fame, was ambition. As a politician, he was selfish, grasping and inordinately ambitious. His own aggrandizement and that of his family, were his ruling passion. In his own person he monopolized the offices of Lieutenant Governor, Chief Justice, Counsellor and Judge of Probate, and as he rose above these subordinate places, he exercised his influence to secure as many of them as he could to members of his own family. Upon his brother Foster, who was Judge of Probate, being promoted to the supreme bench, a son of the Governor succeeded him upon the bench of the Court of Common Pleas while a younger son was appointed clerk of the court. These are but samples of the eagerness with which he seized upon whatever could raise and dignify himself and family. He rose to the highest rank in the province, but he shared the fate of most ambitious men who have abandoned the humbler walks of usefulness or the less dazzling pursuits of science and literature, to climb the dizzy height of political power—ambition led him astray and he died of a broken heart.

EDMUND TROWBRIDGE

Was appointed to succeed Chambers Russell, March 25, 1767.

His name was not to be found in any "Biographical Dictionary" of American names when this sketch was written, but to a lawyer, it need not be told how much the character of Judge Trowbridge is identified with the very system itself, which we call our own common law. It is refreshing to our better feelings, to witness the progress of this able lawyer, rising by severe toil and discipline, and surmounting every obstacle in his honorable career. It is gratifying in another point of view, as serving to mark

the approach of an era when a mere ready tact for business, a popular influence or a family name were no longer to be made the tests of qualification in a judge.

Judge Trowbridge was born in Newton, in 1709, and was graduated at Cambridge at the age of nineteen. He resided and practised law in Cambridge, but was a regular attendant of the courts in some of the other counties.

During a part of his life he bore the name of Goffe, after that of an uncle.

He was one of the most learned lawyers in Massachusetts, and, withal, one of the most devoted students of the law. Such was his learning and ability, that it is said by President Adams, he had the entire command of the practice in Middlesex, Worcester and several other counties, and had the power to crush any young lawyer by a frown or a nod.

In his politics, he was inclining to the prerogative party, but did not lose the popular favor.

In June, 1749, he was appointed by Governor Shirley Attorney General of the province, and held that office till his promotion to the bench of the Superior Court. He was also for some years a member of the council, and continued upon the bench until the Revolution.

Hutchinson is said to have made pretty free use of Judge Trowbridge's legal knowledge while upon the bench, and when his brother Foster was made a judge, Trowbridge was urged, against his own better judgment, to remain in office for the very purpose of sustaining the Governor's brother. Judge Trowbridge continued to hold the place of judge, but lost his respect and friendship for the Governor.

While most of those who held offices under the crown, left the province at the breaking out of the Revolution, Judge Trowbridge remained unmolested, and retained the

confidence and esteem of his former friends, and the respect of the public, though he ever after that event, remained in private life.

He died at Cambridge at the age of 84, April 2, 1793.

Although I have alluded to the character of Judge Trowbridge as a lawyer, I cannot conclude this notice of him without again speaking of him in his relation to the Superior Court. His accuracy as a special pleader is evinced by the forms of his declarations and pleadings, which have been incorporated into our books of practice. His learning and discrimination as a "a real estate" lawyer, are conspicuous in the treatises which he left, some of which have been published in connexion with the reports of our Supreme Court. Few reports of his decisions as a judge, have come down to our times, but from the few which are preserved, as well as from the uniform testimony of his cotemporaries and tradition, he stood justly pre-eminent on the bench and the bar. He did not lose his fondness for the study of the law by ceasing to be connected with the court, but continued to pursue it, and exercised a salutary influence upon the younger members of the profession with whom he associated, in guiding and encouraging them in their incipient struggles with its embarrassments. Chief Justice Parsons was ever ready to acknowledge the benefits he experienced from his early intercourse with Judge Trowbridge.

Many of the most distinguished lawyers in Massachusetts enjoyed the advantages of his instruction, among whom may be mentioned James Putnam, afterwards a judge of the King's Bench in New Brunswick, Chief Justice Dana, and Chief Justice Parsons, already referred to, by whom the light of his intellect has been transmitted to after times with an increased lustre. He retained the favorable regard of the public until his death, although for

many years in retirement, and great and deserved respect was paid to his memory.

FOSTER HUTCHINSON

Was appointed to the Superior Court upon Judge Lynde being raised to the head of that Court. His commission was published September, 1771. He was, as was before remarked, a brother of Governor Hutchinson, and to that circumstance it is probably owing, that he was ever promoted to the place of Judge. He was by profession a merchant, and in the news papers of 1756 he advertises the somewhat heterogeneous stock of salt, glass, steel, cambricks, shirtings, &c., for sale at his store on the "Town Dock." Two years after this, he succeeded his brother, Thomas, as Judge of the Court of Common Pleas, for Suffolk, which office he held till he was appointed to the Superior Court.

In 1766, he was appointed special Judge of Probate during the absence of the Lieutenant Governor, not to exceed twelve months. In 1769, upon his brother being left at the head of the government by the recall of Governor Bernard, he was made the standing Judge of Probate for Suffolk, which office he retained, notwithstanding his appointment to the Superior Court, until the Revolution.

Very little is to be known of Judge Hutchinson from the ordinary sources of information. His brother is represented as having entertained a high opinion of his judgment and capacity, but so far as we can judge from remarks of his cotemporaries, he left his proper sphere by entering the field of judicial labors.

He left the country at the revolution, and went first to Halifax, and from thence to England.[1]

[1] A letter from Halifax, dated September 11, 1776, speaks of "Foster Hutchinson and tribe" being there and preparing to go to England.

NATHANIEL ROPES

Was commissioned in 1772, upon Judge Oliver being created Chief Justice.

He was born in Salem, May 20, 1726, and was graduated at Cambridge in 1745.

He was, for some years, a member of the House of Representatives, and from 1762 to 1769, was of the council. In 1766, he received the two appointments of Judge of Probate for Essex, and that of Chief Justice of the Court of Common Pleas for that county.

Of his fitness or capacity for the office of Judge, I have no means of determining. He could not have been very prominent among the leading men even upon the government side.

He resided in Salem, where he died, March 18, 1774, and the Historian of that town has summed up his character in this brief notice, "his honors were many and he was worthy of them."

The name of Judge Ropes, lives in his highly respectable posterity, but the little that is known of him in his official capacity, is but another illustration, how ineffectual is the mere possession of place and power without true greatness of mind, to preserve for posterity the memory of him who enjoys them.

WILLIAM BROWN

Succeeded Judge Ropes June 15, 1774. He was born in Salem, and was graduated at Cambridge in 1755. He was descended from an ancient and respectable family in that town, several of whom had been connected with the Judiciary of the Province, and the rank which he held in his class by birth, compared with that of others of his classmates, and their subsequent fortunes in life was a fine illustration of the tendency of our institutions to break

down the factitious influence of family, and to elevate talent and enterprise however humble in their origin. In the class of 1755, the name of William Brown stands the third, John Wentworth, afterwards Gov. of N. Hampshire and of Nova Scotia, is the fifth, David Sewall, afterwards Judge of the Supreme Court of Massachusetts, was the tenth, Tristram Dalton, afterwards a senator in Congress, was the eleventh, and John Adams, afterwards president of the United States, stood as low as the fourteenth, in the rank of his family.

In 1764, he was appointed collector of the port of Salem, and in 1770, was made a Judge of the Court of Common Pleas, for the county of Essex. He was, for several years, a representative from Salem, and among other honors he enjoyed, was that of commanding the Essex Regiment, in which office he was succeeded by the celebrated Timothy Pickering.

From the account which President Adams has left of Judge Brown, it would seem that, at first, he was inclined in politics to the liberal party. Indeed he was removed from the office of collector for not more rigidly enforcing the "laws of trade," which were so odious to the people of Massachusetts. "But," says Mr. Adams, "they made him a Judge of the Superior Court, and that society made him a refugee—a tory, I verily believe he never was."

His appointment as Judge of the Superior Court, met with serious opposition in the Council. He was nominated in May, 1774, at a meeting when only seven were present. But they dare not risk their popularity by confirming his appointment, and deferred acting upon the nomination until a new Council should be chosen. He was not, therefore, confirmed as Judge, till June 15, of that year.

The same year of his appointment to the Superior

Court, he was made a "Mandamus Counsellor," in consequence of which a committee of the Essex Convention, then sitting in Ipswich, applied to him to resign both offices. He replied, that "he meant to conduct with honor and integrity, but would do nothing derogatory to the character of a counsellor of his Majesty's Province." Upon this refusal being made known, the officers of his regiment refused to serve under him, and resigned their commissions.

He remained upon the bench until the Revolution, when he left the country, and in 1781 was made Governor of Bermuda.

WILLIAM CUSHING

Was appointed to the Superior Bench at the same time with Judge Ropes in 1772. He remained upon the bench until the Revolution, and was the only one of that court who was restored to office under the new organization of the Judiciary. And, although his history is more particularly identified with that of a later period than the one to which we have arrived in these sketches, it has been thought proper to complete the notice of him in this place.

Judge Cushing was born in Scituate, March, 1732, and was the son of John Cushing, the second of the name who had been a Judge of the Superior Court. He was graduated at Cambridge in 1751, and studied law with Jeremy Gridley. Before commencing his professional studies, he had been employed as a school teacher in Roxbury, where Increase Sumner, afterwards Governor of the Commonwealth, was one of his pupils.

Upon being admitted to the bar, he commenced business in Dresden, then a part of Pownalboro, Maine, in 1755, and was the first regularly educated lawyer who settled in Maine. In 1760 he was appointed the first Judge of Pro-

bate for the county of Lincoln, and in 1772, succeeded his father as a Judge of the Superior Court.

In November, 1775, the Superior Court was reorganized and Judge Cushing was restored to his place on the bench. John Adams was appointed Chief Justice, but never sat as a Judge, and, the following year, he resigned his place on the bench. Judge Cushing was then appointed his successor, and held the office till his promotion to the Supreme Court of the United States in 1789. In the mean time, he presided over the Convention which assembled in Massachusetts in 1787, to act in regard to the adoption of the constitution of the United States.

While Chief Justice Jay was absent in Europe, as envoy extraordinary, in negotiating the treaty with Great Britain, Judge Cushing was the presiding Judge of the United States Court, and upon the resignation of Judge Jay, he was nominated and unanimously confirmed as Chief Justice of that Court. His ill health, however, compelled him to decline the honor of this appointment, and he continued to hold the place of an associate justice until 1810, the time of his death.

He was eminent for his learning, as well as for his unshaken integrity and deliberate judgment, and the confidence with which he was honored during the whole period of his life, though one of the most trying in our annals, is of itself the strongest proof of his ability as a judge, and his honesty and independence as a man. He brought with him upon the bench, under the new constitution of the court, some of the artificial insignia of office which, under the royal government, were regarded as essential to secure a proper degree of respect in the public mind. He was the last Chief Justice who wore the large English wig while sitting in Court.[1]

[1] It is said Judge Cushing abandoned his large wig on account of the obser-

As an orator, he had a ready command of language, but his temperament was not adapted to producing powerful and exciting appeals. And his excellence consisted in his cool, logical and lucid argumentation, which convinced, if it did not move his hearers.

In his politics, he was before and during the Revolution a whig, and after the achievement of our national independence belonged to that party who were known as Federalists, but of his character as a politician it is not proposed to speak. For many years before his death he resided in Scituate, his native town.

In person he was of middling stature, erect and graceful. His form was slender, and his complexion fair. In private life he was an amiable and delightful friend and companion, as a scholar he possessed a cultivated taste and a respectable share of general learning, and his various relations in public life he sustained with honor to himself and usefulness to his country.

With this imperfect sketch of Chief Justice Cushing, terminate these notices of the men who constituted the highest tribunal of Justice in Massachusetts during the existence of its provincial charter. I have more than once expressed regret that these were necessarily so brief, and I can again repeat that great injustice would be done to the memory of these eminent men of a former age, if the sketches here given were regarded in any other light than a mere effort to arrange, for more easy access, the names of those who composed our judiciary during a period that is fast passing beyond the memory of living witnesses.

vation it attracted while holding a court in New York. The boys followed him in the street with silent admiration, but he was not conscious of the cause until he heard the exclamation of a sailor who came suddenly upon him, "my eyes what a wig," whereupon he changed it to one of more moderate dimensions. (Law Reporter.)

This work cannot be complete without extending our inquiries beyond its original design, and appending to it a list of the Judges of the courts of Common Pleas, in some of the principal counties of the Province. In doing this however, I have far less to guide me than in regard to the Superior Court. The appointments to the inferior courts were so frequent, the rank of those who received them was often so obscure, and the records of their proceedings are, in some counties, so defective, that nothing beyond a meagre and imperfect account could reasonably be expected from almost any effort.

CHAPTER XIII.

Personal notices of the Judges of the Courts of Common Pleas during the continuance of the Province charter.

The territory of Massachusetts was early divided into counties, of which at the time of the Revolution, there were eleven in number.

Suffolk, Essex and Middlesex were incorporated in 1643, Hampshire in 1662, Plymouth, Bristol and Barnstable in 1685, Dukes and Nantucket in 1695, Worcester in 1731, and Berkshire in 1761.

Under the province charter a Court of Common Pleas was established in each of these counties, consisting of four judges.

As it is my purpose to present, so far as I have been able to learn them, the names of the several judges who have held places in these courts, the most proper course seems to be to consider each county by itself.

SUFFOLK COUNTY.

The courts of this county have uniformly been held in Boston. A term of the Common Pleas was held here July 26, 1692, in pursuance of a special act of the General Court, before the organization of the courts under the charter had been made.

This term was held by Chief Justice Stoughton, John Richards, Wait Winthrop and Samuel Sewall, who have

severally been noticed in their connexion with the Superior Court.

The first regular term of the Court of Common Pleas in this county, was holden March 7, 1693, when the commissions of its judges were formally published. These and their successors before the Revolution, so far as they have been ascertained, were as follow.

ELISHA HUTCHINSON,[1] March 3, 1693, to Dec. 10, 1717.
John Foster, March 3, 1693, to January 1710.
Peter Sergeant, March 3, 1693, to 1702.
Isaac Addington, March 3, 1693, to 1702.
PENN TOWNSEND, 1702, to August 21, 1727.
Jeremiah Dummer, 1702, to 1715.
THOMAS PALMER, 1711, to 1740.
Edward Lyde, December 29, 1715, to 1723.
ADAM WINTHROP, December 29, 1715, to 1741.
EDWARD HUTCHINSON, 1723, to 1731, and 1740, to 1752.
William Dudley, 1728, to 1731, — 1733, to 1743.
NATHANIEL BYFIELD, December 9, 1731, to 1733.
Elisha Cooke, December 9, 1731, to July 1733.
Anthony Stoddard, July 1733, to 1748.
ELIAKIM HUTCHINSON, 1741, to Revolution.
Edward Winslow, 1743, to 1753.
Samuel Watts, 1748, to 1770.
Thomas Hutchinson, 1752, to 1758.
Samuel Welles, 1755, to 1770.
Foster Hutchinson, 1758, to 1771.
William Reed, 1770, to Revolution.
Nathaniel Hatch, 1771, to Revolution.
Joseph Green, July 3, 1772, to December 31, 1772.
Thomas Hutchinson, Jr. 1772, to Revolution.

[1] The names of those who held the place of Chief Justice of this court, are printed in small capitals.

Benjamin Gridley, May 1775, after Revolution had begun.

Commissions were issued by a major part of the council October 31, 1775, to

Samuel Dexter,
John Hill,
Samuel Niles and
Samuel Pemberton.

Elisha Hutchinson, the first Chief Justice of the Court of Common Pleas of Suffolk county, was born in Boston, in 1640, and was the grand-son of the distinguished Anne Hutchinson, whose antinomian opinions gave such special offence to the early fathers of the colony.

The father of Judge Hutchinson was Edward, who was killed by the Indians in 1675.

Although bred to a mercantile profession, which he afterwards pursued, for a livelihood, he was long engaged in public life, and filled many important and responsible offices. From 1680 to 1684 he was a member of the House of Representatives, and afterwards was elected an assistant under the old Charter.

In politics he belonged to the liberal party, who clung with such tenacity to the Colony Charter, and was among the number who would consent to no compromise, preferring to abandon every thing rather than consent to any modified form of government. Of this party Major Gookin and Elisha Cooke, were members, and of course were found in opposition to Dudley and Andros, as the government successively passed into their hands.

During the administration of the latter, Mr. Hutchinson was in London, and while there joined with Samuel Nowell and Increase Mather in a petition to the Lords Committee for Trade and Plantations, for relief from the oppressive acts under which the colony was suffering. But

the petition seems to have produced no effect. Andros continued to exercise his tyranny till the people could endure it no longer, when they rose and having deposed him resumed their former charter.

In this revolution Mr. Hutchinson was found upon the popular side, and was not only made one of the Assistants, but received one military appointment after another until he was placed at the head of the colony forces, and held that office at the time of the arrival of Governor Phipps with the new charter in 1692.

In this charter Mr. Hutchinson was named as one of the Council, and afterwards held that place until his death. He is said to have been the second Colonel of the Boston Regiment, succeeding Colonel Shrimpton, who was the first, in point of time, who ever held that office.

From his military rank he was commander of the Castle, a post of honor and some emolument, but having been adverse to Governor Dudley in his politics, when that gentleman came into the government in 1702, he was removed from his command, although he was suffered to retain his judicial office.

This, the Governor did by issuing a new commission, as it was supposed that the former commissions of the Judges were vacated by the death or removal of the Governor by whom they had been granted..

His commission was again renewed upon Governor Shute's coming into power, and he continued to hold the office until his death, which took place December 10, 1717, at the age of 77.

There is no memorial of Judge Hutchinson left, whereby his competency to fill a judicial office can be estimated. But the part which he took in the leading events of the day, shows that he exercised a commanding influence and held a high rank both under the old charter and the new.

He was the father of Thomas Hutchinson, whose son Thomas was governor of the province a short time previous to the Revolution. His son Edward was a judge of the Court of Common Pleas, and, as will appear in the sequel, two of his grand-sons, as well as a great-grand-son, successively held the same office.

JOHN FOSTER was a native of Aylesbury in England, and came to this country to pursue his business as a merchant, by which he acquired a large estate. It is not ascertained when he arrived in New England, but he was admitted a freeman in 1682, and in 1689 was one of the most leading men in the colony in promoting the revolution that overthrew Andros.

He was made one of the committee of safety on that occasion, and more of the papers that were issued at that time by the friends of the people, came from his pen than from that of any other person who was engaged in the revolution.

With Adam Winthrop, he was made steward or treasurer of the colony until the government could be settled, and from that time till the arrival of the Province Charter, he took a leading part in the public affairs.

Among other offices he held that of colonel of the colonial troops.

He was named as a counsellor in the charter of 1692, and continued to be re-elected to that place until his death, February 9, 1711.

Few memorials remain of this able and distinguished man, and even his connexion with this court has only been discovered by tracing its records to find who had held the places of judges upon its Bench. Hutchinson says he was "a wealthy merchant in the town of Boston and of a most fair and unblemished character."

PETER SERGEANT and ISAAC ADDINGTON have been noticed in other parts of this work.

PENN TOWNSEND was born in Boston in 1651, and was the son of William Townsend. He succeeded Judge Sergeant upon the Bench of this court.

He was long engaged in public life, both in a civil and a military capacity, and was commonly known as Colonel Townsend.

He was one of the persons mentioned by Dunton in his "Life and Errors," when describing his visit to New England in 1685, and is there spoken of as "a gentleman, very courteous and affable in his conversation."

He became a member of the House of Representatives in 1686, the year of the arrival of Governor Andros. In the controversy with the Governor, he was upon the side of the people, and was made one of the committee of safety at the time of the Revolution in 1689, in whose hands the functions of government were for a while entrusted.

At the election in December, 1689, he was again chosen to the House, and was continued a member of that body until 1698. During four years of this time he was the speaker of the House.

Owing to the disastrous fate of the "Canada Expedition," as it was called, in 1690, the colony were obliged to resort to Bills of Credit as a means of defraying the expenses of that undertaking. These were the first of that species of paper money that was multiplied to such a ruinous extent at a subsequent period, and Colonel Townsend was one of the committee who were authorised to issue the Bills.

He continued to hold his place upon the bench of the Common Pleas, being for some years its Chief Justice, until his death, which took place at the age of 75, on the 21st August, 1727.

JEREMIAH DUMMER was the son of Richard Dummer, and was born in Newbury, September 14, 1645. His father was among the wealthiest and most influential men in the colony, and one of its most public spirited benefactors.

It is impossible now to determine from any historical memoranda, to what extent Judge Dummer was a leading man in the colony. But he so far enjoyed the public confidence that he was made one of the committee of safety at the time of the Revolution in 1689.

It is principally, however, through the fame of his distinguished and gifted son, Jeremy, that he is remembered. The reputation of his son, as a scholar, was one of which the Province was justly proud, and his services as its agent entitled him to public gratitude.

Judge Dummer remained upon the bench until the year 1715, when, probably on account of his age, he was omitted in the new commission to the judges which was then issued by Lieutenant Governor Tailer. He died May 24, 1718, at the age of 73.

From any thing that has come down to us at this day, in regard to the character or capacity of Judge Dummer, it is fair to infer that he owed his preferment rather to his family rank and influence than to the possession of any commanding talents or distinguished personal qualifications for office.

Of THOMAS PALMER and EDWARD LYDE, I have found no memorials beyond their connexion with this court, if I except the fact that Mr. Lyde was at one time one of the wardens of the King's Chapel in Boston, and that Judge Palmer died October 8, 1740.

ADAM WINTHROP was a great-grand-son of the first Governor of Massachusetts—his father and grand-father bearing the same name with himself. He was graduated at Cam-

bridge in 1694. Like most of the distinguished men in that day, he was promoted to a military command, and, at one time, was "Captain of the Castle," which was regarded as an honorable and important office.

He was a representative from Boston, in the General Court, as early as 1714, and continued a member of that body or of the Council several years.

He held the office of Judge of this court until within about two years of his death, when he resigned the place. He died October 2, 1743, leaving two sons, one bearing his own name, who was Clerk of the courts in Suffolk, and the other bearing the name of John. Although Judge Winthrop must have been a respectable and influential man, the reputation of his son John far out-shone that of the father. He was a learned and distinguished Professor in the College at Cambridge, and in mathematical science was considered superior to any man in America. He was a member of the Royal society, and otherwise honored by literary and scientific associations in Europe.

EDWARD HUTCHINSON was a son of Elisha Hutchinson already mentioned, and brother of Thomas the father of Governor Hutchinson. He was born in 1678. He rose to the rank of Colonel of the Provincial troops in his military career, and seems early to have entered public life. He was a representative from Boston in the years 1717 and 18.

In 1723 he succeeded Judge Lyde upon the bench of this court, and held the place till 1731, when he was removed by Governor Belcher to make room for one of his favorites whom he was desirous of rewarding by an office. This was done notwithstanding Judge Hutchinson was a firm friend and supporter of the government, and even of Governor Belcher himself. Nor was it till 1740, that he was restored to office. After that he remained a member of the court until his death, March 16, 1752, at the age of

74. At the time of his death he also held the office of Judge of Probate for Suffolk County, and was succeeded by his nephew, afterwards Governor, Thomas Hutchinson.

William Dudley appears to have been the first educated lawyer who sat upon the bench of the Common Pleas. He, however, had never practised law as a profession, and in selecting him for the place, more regard was, probably, had to his public services than his learning as a lawyer.

He filled a pretty large place in the public affairs of his time, and merits a much fuller notice than the present space or opportunity will admit.

He was the youngest son of Governor Joseph Dudley, and was born in Roxbury in 1686. He was graduated at Cambridge in 1704. After completing his legal education he retired to Roxbury, where he built an elegant seat and lived in a style of generous hospitality.

During the government of his father, parties in the Province ran high, and as the Governor was ambitious to promote his own family as well as to enlist talent in support of his measures, his son William was early brought into public life. The first of his public services seems to have been an embassy to Canada in 1706, to negotiate an exchange of prisoners, where he succeeded in redeeming the Rev. Mr. Williams of Deerfield.

In 1710, an expedition against Port Royal was successfully carried on, in which Mr. Dudley bore an active part, and acquired considerable reputation as an officer. He subsequently was promoted to the command of a Regiment of the provincial troops.

He represented Roxbury several years in the General Court, and during the years 1724 to 1728 inclusive, was speaker of the House. The following year he was elected to the Council.

He married a daughter of Addington Davenport, one

of the Judges of the Superior Court, by whom he had two sons, who were said by his biographer to have been "very unlike their ancestors."

Colonel Dudley died at the early age of 57, August 10, 1743, in the midst of his usefulness and honors.

He had been displaced by Governor Belcher from the court of Common Pleas, to make room for a favorite of the Governor, but after the end of about two years he was restored to his office of Judge of that court.

He is represented as having been extremely popular in the Province, and to have possessed talents of a very high order. As a popular debater he had distinguished merits, possessing strong intellectual powers, as well as a brilliant fancy and a ready elocution, and thereby exercised a commanding influence in all public assemblies of which he was a member.

Although the name of Colonel Dudley is often to be met with in history, especially in that of Hutchinson, I have borrowed the substance of this sketch from Elliot's notice of his character, and can only regret that it is so meagre in its details.

ANTHONY STODDARD. Although connected by family with some of the most distinguished men in the colony, I have discovered very little of his personal history. He was born in 1678, and was graduated at Cambridge in 1697.

His grand-father, Anthony Stoddard, married a sister of the distinguished Sir George Downing, whose history is connected with that of England during the time of Cromwell. He was the father of Solomon Stoddard of Northampton, so eminent among the early divines of New England. The father of the judge was of the name of Simeon. He held the office of Judge until his death, March 11, 1748.

He once represented Boston in the General Court, but

how far he was engaged in public life beyond this, I have no means of ascertaining.

Samuel Watts was a distinguished gentleman of Chelsea, and was long and extensively employed in public services, the enumeration of which could be of little use. Among these may be mentioned his connexion with the Land Bank, of which he was a Director. This scheme for raising money was particularly odious to Governor Belcher who, in order to suppress it, would not permit any of its officers to enjoy any civil office under him. Mr. Watts therefore, having been elected speaker of the House, was negatived by the Governor.

In 1746, he is found connected with the army, and was commissioned as muster master of the forces which were raised for an expedition against Canada.

In 1752, he was appointed a commissioner with Thomas Hubbard and Chambers Russell to treat with the Eastern Indians.

He died March 12, 1770, having continued to hold his place upon the bench until that time.

From a brief notice of his death contained in the Boston Evening Post, I copy the following extract as containing a summary of the character of Judge Watts. He discharged the duties of the offices which he held, "to general acceptance, with firmness and integrity, and, as he lived, so he died, a lover of all mankind, a friend to his country and truly an honest man."

Elisha Cooke was the second of the name, and filled a far greater sphere in his political than his judicial capacity. If I were to speak at any considerable length of the former it would require a detail of the public events of three successive administrations, since from the time he entered public life till his death, his name is connected with most of the leading measures of the government.

His connexion with the courts was very brief, having been appointed by Governor Belcher in 1731, and having left it in 1733. In order to make place for him upon the bench, one of the Judges who was not acceptable to the Governor was omitted in the commission which he saw fit to issue to them upon coming into power.

In renewing the commissions of the Judges, Governor Belcher did no more than what had generally been thought proper by his predecessors. The exercise of the power however was strongly resisted upon his coming into office, but the Council at last yielded and confirmed his new nominations. Mr. Cooke and Mr. Byfield were among the favorites whom he saw fit to prefer on this occasion, and so far as the people were concerned, the nomination of Mr. Cooke was a highly acceptable appointment.

He was a son of Judge Elisha Cooke, who had been a member of the Superior Court. His mother was a daughter of Governor Leverett.

He was born December 20, 1678, and was graduated at Cambridge in 1697. Like his father he studied and practised medicine and was a successful physician.

It was principally however as a political leader that his name has come down to posterity. In 1702, he was appointed Clerk of the Superior Court in Boston, where all the records of that court were then preserved. He held the office until 1718, when on account of some free remarks made by him concerning Governor Shute, he was displaced from the office, and the following year his name was erased by the Governor, from the list of Counsellors, of which body he had been one year a member.

From that time an uncompromising hostility arose between him and the Governor, which was carried on as long as Colonel Shute remained in the government.

He had been a member of the House in 1715 and 1716,

and after his rejection as a Counsellor he was again elected to that branch, and was at once chosen its speaker. Governor Shute negatived the choice, and the acrimony of party spirit growing out of this measure rendered the year 1720, memorable in the history of parties in the province.

The popularity and influence of Mr. Cooke were such, that the House refused to recede or to elect another presiding officer, and in consequence thereof the Governor dissolved the assembly. Although he was a member of the House nineteen years after the time of his election as speaker, he does not seem to have ever been again chosen to preside over its deliberations.

Mr. Cooke was at the head of the democracy of the province, and at all times a consistent opposer of the undue exercise of prerogative. The House of Representatives went with him in sentiment, and Governor Shute found no quiet till his return to England in 1722.

Upon arriving in England the Governor preferred a complaint to the King against the province, embracing charges which rendered it necessary to send an agent to London to answer to those charges. To the great chagrin of the Governor, his determined foe Mr. Cooke was chosen to this agency and went to England in the performance of the trust in 1723.

He remained in London till 1726, when he returned to Massachusetts and was again elected to the Council, and was permitted by Lieutenant Governor Dummer to take his seat at that board.

Governor Burnett succeeded Colonel Shute as Governor, and Mr. Cooke soon after his arrival found himself in opposition to the government, and remained in that position during Burnett's administration.

Of Governor Belcher, who next succeeded to the government, he was both a personal friend and ardent support-

er, and by this means the confidence of the people in his political consistency was for a while impaired.

But in his opposition to the exercise of arbitrary power he was alike consistent, whether upon the bench, a candidate for popular election, or a member of the Council.

Among the illustrations of this trait of his character while he was upon the bench, I have selected the following as an example. In 1731, the Court of Common Pleas passed a peremptory order that a certain number of constables should attend their sittings. To this order Judge Cooke dissented. The constables refused to attend, and the court thereupon imposed a fine upon them for their contempt. Mr. Cooke however protested against the proceedings of the court as well as against their original order and caused his protest to be entered upon the records of the court.

Although as a political adversary he was justly to be dreaded, yet even his enemies accorded to him the character of a fair and open antagonist and an honest supporter of his own political opinions.

He literally wore himself out in the service of the people by whom he was honored and beloved, and died in 1737 at the early age of 59.

He was buried with every mark of respect. Minute guns were fired from the battery on Long Wharf, and most of the vessels in the harbor had their flags hoisted at half mast during the ceremony of his burial.

In private life his character was every thing to admire —kind, faithful and affectionate as a husband and a father, sincere as a friend and upright as a man. The few years he was upon the bench seem not to have produced any marked influence upon him or upon the court. He received the appointment as a reward for his political ser-

vices, and neither lent nor derived from the place either honor or essential benefit.

Although he was probably the most uniformly popular man who ever flourished as a politician in Massachusetts, yet he found a politician's life one of anxious care and unrequited toil—a ceaseless struggle to ride in safety upon the treacherous waves of popular favor, in which personal quiet and self respect are too often sacrificed to political expediency or the achievement of some transient party triumph.

Of THOMAS, afterwards Governor HUTCHINSON and ELIAKIM HUTCHINSON I do not propose to speak in this place, as the former is fully noticed in another part of this work, and of the latter I am not in possession of any definite information beyond his long continued connexion with this court. He was descended from the famous Mrs. Hutchinson, through her son Richard, one of whose sons, Eliakim, was the grand-father of Judge Eliakim.

EDWARD WINSLOW was sheriff of the county of Suffolk at the time of his promotion to the bench as successor of Col. William Dudley. He had also held a military command as colonel of the Suffolk Regiment. He was a man of great consideration in his day, and among other offices which he held at the time of his death, was that of Treasurer of the county of Suffolk.

He remained upon the bench until his death, which took place in December, 1753, at the advanced age of 85, so that he must have been at least seventy-five years of age when he first received his appointment to this court.

SAMUEL WELLES was a member of this court for the term of fifteen years, but was much more distinguished for his political than his judicial services. The marks of public favor and confidence which he received, are too numer-

ous to repeat, and I will only mention a few of the places he was commissioned to fill.

He was, for many years, a member of the House of Representatives from Boston. While a member of that body, the plan of an union of the colonies was proposed, and delegates from New York, Pennsylvania, Massachusetts, New Hampshire, Rhode Island, Connecticut and Maryland met at Albany, June 1754. At the head of the delegation from Massachusetts was Mr. Welles, although Governor Hutchinson was also one of the delegation.

Two years after this, he was joined in a commission with Sir William Pepperell and Mr. Hutchinson to meet Lord Loudon in Albany, to devise means for relieving Massachusetts from the debt she had incurred in the prosecution of the war. The following year, he met Lord Loudon in Boston, where a meeting of delegates from the New England colonies was held for the purpose of devising means of carrying on the war in which the country was then embroiled with the French and Indians.

In 1765, Lord Adam Gordon visited Boston, and a committee consisting of Mr. Welles and Thomas Hubbard was appointed to receive him upon his arrival.

He was, for some years, a member of the Council, though in his politics he must have been of the popular party, for, on one occasion he was appointed of a committee to tender to General Conway and Colonel Barre the thanks of the citizens of Boston for their magnanimous services in behalf of the colonies in the British Parliament.

Wherein his claims upon the public favor consisted, there are few or no data by which to determine. He did not live to take part in the events of the Revolution, as his death took place May 20, 1770, at an advanced age.

FOSTER HUTCHINSON and WILLIAM REED are mentioned

in their connexion with other courts of which they were members.

NATHANIEL HATCH belonged to Dorchester, and was graduated at Cambridge in 1742. He was one of the commissioners of the Land Bank in 1763, and succeeded Judge Welles upon the bench of the Common Pleas, in 1771.

In his politics he belonged to the party of the loyalists, and left the country at the breaking out of the Revolution.

JOSEPH GREENE was the successor of Foster Hutchinson, but held the office only for a few months. I have learned little of the previous or subsequent history of Judge Green.

He was named as one of the Mandamus Counsellors in 1774, but declined acting in that capacity. He left the province at the Revolution, and his name is among those "refugees" who were forbidden to return.

THOMAS HUTCHINSON, Jr. was the son of Governor Hutchinson. He was graduated at Cambridge, 1758, and engaged in mercantile pursuits, and as such was publicly denounced in 1769, for importing goods contrary to the agreement entered into by the merchants of Boston. Being a royalist in his political opinions, he was obliged to leave the country at the Revolution. He went to England, where he continued to reside until his death in 1811, at the age of 71.

BENJAMIN GRIDLEY, though regularly commissioned as a member of this court in May, 1775, can hardly be enumerated among its judges, for the functions of the court had ceased in October previous to his appointment. His was the last nomination made for this court by a royal Governor.

Mr. Gridley was a barrister at law, and was graduated at Cambridge, in 1751. Being a royalist, he left the country

at the time of the Revolution, and was prohibited from returning again by a general act of the legislature in September, 1778.

As the records of this court in Suffolk are wanting from 1752, to 1776, it does not appear from them when the last term of it was held. New commissions were issued by the majority of the Council in the name of "the Government and People of Massachusetts Bay in New England," in October 1775.

It is hardly necessary to say that these commissions were granted to a different class of men from those who had held office under the king. And on referring to the records of the Council it appears that Samuel Dexter, John Hill, Samuel Niles and Samuel Pemberton, who have already been named, were the persons embraced in the commission.

Mr. Dexter does not appear to have acted under his appointment, for Thomas Cushing was appointed Chief Justice of the court in February, 1776. And I do not find that any term of the Common Pleas in Suffolk, was held before April, 1776.

In order to present a complete list of those who acted as Judges of this court before the Revolution, it would be necessary to name the special Judges who from time to time were appointed to act in the place of some or all of its standing Judges.

But this would swell the catalogue to an unreasonable extent, in consequence of the frequency of these appointments.

The records of the court would lead one to suppose that the appointment of its special Judges was not always regarded as desirable, and for the sake of illustration I have selected an instance of the kind.

In 1732, the sheriff was ordered by the court then in

session, to wait upon Thomas Hutchinson, Thomas Fitch, Anthony Stoddard and Thomas Steele, commissioned as Justices of the Court of Common Pleas, for the trial of an action between Samuel Swazey and Nathaniel Byfield, (then Chief Justice of the court,) to acquaint them that the court were then ready to give way to them, in order to their hearing and trying said action, the next day.

The sheriff afterwards came into court and informed them that he had waited upon Mr. Hutchinson, who told him that he had already excused himself to the Governor and Council, and that he peremptorily declined acting on said commission; that the Honorable Thomas Fitch told him he was lame of the gout and was unable to act; that Mr. Stoddard said he was ready to act if the other gentlemen would; and that Mr. Steele said he was lame and unable to attend to the service.

From the names of the Judges of this court, it may be fairly inferred that it was always regarded with a respect during the administration of the Royal Governors in Massachusetts, superior to that of similar courts in most of the other counties, and it is a matter of regret that no more is known of its history during this period.

MIDDLESEX COUNTY.

The Courts of Common Pleas for this county were held by the Deputy Governor and Assistants until October, 1692, when a court, consisting of a Chief Justice and sundry Justices of the Peace, was held for a single term, and its first regular term after its organization under the charter seems to have been December 13, 1692. For several terms however, after that, for some reason, three or more Justices of the Peace sat with the regular Judges when they held the court, though this custom was soon discontinued.

The names of the Judges of this court, so far as they have been ascertained, were as follow.

JOHN PHILLIPS, December 7, 1692, to 1715.
James Russell, December 7, 1692, to 1707.
Joseph Lynde, December 7, 1692, to 1719.
Samuel Hayman, December 7, 1692, to 1702.
Jonathan Tyng, July 1702, to 1719.
Francis Foxcroft, 1707, to 1719.
JONATHAN REMINGTON, 1715, to 1733.
JONATHAN DOWSE, 1719, to 1741.
Charles Chambers, 1719, to 1739.
FRANCIS FULLAM, 1719, to 1755.
Thomas Greaves, 1733, to 1738, and from 1739 to 1747.
Francis Foxcroft, 1737, to 1764.
SAMUEL DANFORTH, 1741, to Revolution.
Chambers Russell, 1747, to 1752.
Andrew Boardman, 1752, to 1769.
William Lawrence,[1] 1755, to 1763.
John Tyng, 1763, to Revolution.
Richard Foster, 1764, to 1771.
Joseph Lee, 1769, to Revolution.
James Russell, 1771, to Revolution.
Commissions were issued November 2, 1775, to
JOHN TYNG, of Dunstable,
Henry Gardner, of Stow,
John Remington,
Samuel P. Savage, of Weston.

JOHN PHILLIPS belonged to Charlestown, and was born in 1631. He was long engaged in public life, and held many responsible places in the administration of the government. From his epitaph—transcribed by a writer in the Historical Collections, it appears that he was at differ-

[1] Judge Lawrence belonged to Groton, but I have found no memorial of him.

ent times a Judge of Admiralty, Treasurer of the Province, Colonel of a Regiment, and for many years a member of the Council. If the statement in regard to his connexion with the Court of Admiralty be correct, it must have been either as Deputy Judge, which is very probable, or he could have held the office only for a brief period.

Under the colony charter, he was a member of the House of Representatives from 1683, to 1686, and at the time of the Revolution in 1689, he was constituted one of the committee of safety who assumed the government, until the old charter was resumed.

He was named of the Council in the new charter, and continued a member of that body until 1716, when he seems to have left public life, probably on account of his age, being then 85 years of age. He however survived until March 20, 1725, when he died at the age of 94.

James Russell was also of Charlestown, and was the son of Richard Russell, the ancestor of the family of this name which has produced many public spirited and distinguished men. He was born October 4, 1640, and married a daughter of Governor Haynes. He was a representative and one of the assistants under the old charter, and was one of the council of safety, at the deposition of Governor Andros.

Under the new charter he was named as one of the Council, and was at one time Treasurer of the province.

He died April 28, 1709, aged 68.

Joseph Lynde was born in Charlestown, in June, 1636, and represented that town several years under the colony charter. He was also an assistant under that charter, and when the people assumed the government in 1689, he was made one of the committee of safety.

Under the new charter he was named as a Counsellor, and was constituted one of the first Judges of the Court

of Common Pleas in Middlesex, which office he held until 1719. He died at the age of 90, January 29, 1727.

SAMUEL HAYMAN, as stated by Farmer, was of Watertown, and was named as a member of the Council in the province charter. He had been a representative under the colony charter in 1690, but I have been unable to find any other notice of him besides his connexion with this court. He must have removed from Charlestown to Watertown after 1692, for he represented the former in 1690, and in 1692.

JONATHAN TYNG. The only information I have obtained of Judge Tyng, is derived from very brief notices of him which are to be found in Farmer's Register, and in the Collections of the Massachusetts Historical Society. From these, it appears that he was the oldest son of Edmund Tyng, the ancestor of the families of this name in New England. He was born in 1642, and married a daughter of Hezekiah Usher, a prominent family in the colony. He was the grand-father of Judge John Tyng, of Tyngsboro', who was distinguished among other things, for his great eccentricity of character. One of his sisters married Vice President Willard of Cambridge College, and another Governor Joseph Dudley.

His brother Edward, as well as himself, were members both of Dudley's and Andros' Councils, but neither of them were named of the Council in the charter of William and Mary.

Upon Dudley's coming into power in 1702, he commissioned the subject of this notice as Judge of the Court of Common Pleas, which place he held until 1719.

He is called by Farmer, "of Woburn, a magistrate and a man of influence." He died at the age of 82, Jan. 19, 1724,

FRANCIS FOXCROFT was of Cambridge. Few memorials are left of him, but among them is the very creditable

fact that he was decidedly opposed to the witchcraft mania that prevailed in 1692, and disapproved of the proceedings against its unfortunate victims.

He was in commission as a magistrate under Andros, and rendered his name somewhat famous for having issued a warrant to arrest and imprison a Mr. Winslow, who brought from Virginia a copy of the Prince of Orange's declaration on his landing in England. The charge against the prisoner was the "bringing into the country a traitorous and treasonable libel." The revolution shortly after followed, and nothing more was heard of the prosecution.

From an address to King William soon after his accession to the throne, signed by Judge Foxcroft as one of the church wardens of the Episcopal Church in Boston, it would seem that he was no friend to this revolution.

"We have lately," says the petition, "to our great horror and amazement, been forced to behold a well established and orderly government here subverted and overthrown," &c. &c. "And all this by a party of pretended zealous and godly men moved upon by no other grounds or reasons but their own ill principles, malice and envy, being more fond and regardful of the former charter government (famous for nothing but their mal-administration and cruel persecutions of all persons differing from them in matters of religion only,) than of their duty and allegiance to your majesty," &c.

Although language and sentiments like these, were but little calculated to win popular favor, he seems to have been remembered by Governor Dudley, who never forgot his enemies if he did not always remember his friends, who rewarded him with a place on the bench of this court which he held till 1719.

He left two sons, one of them the popular minister of

the first church in Boston, and the other afterwards, a Judge of the same court of which his father had himself been a member.

He died in January, 1728, in the 71st year of his age.

JONATHAN REMINGTON has already been noticed in his connexion with the Superior Court.

Of JONATHAN DOWSE I have learned nothing except that he resided in Charlestown and was connected with this court as already stated, and a part of the time its Chief Justice.

CHARLES CHAMBERS was the grand-father of Chambers Russell, a Judge of the Superior Court. But beyond this fact I have discovered little of his history. He belonged to Charlestown and resigned his place upon the bench in 1739.

FRANCIS FULLAM was of Weston, and held many public offices besides that of Chief Justice of this court, such as Colonel in the Militia, member of the Council, &c. He resigned his place upon the bench a few years before his death. This took place January 18, 1758, at the age of 87. He is spoken of as a man of "distinguished natural powers and good conduct," and as "having discharged the duties of his several *betrustments* with honor, and died with the serenity and good hope of a Christian."

THOMAS GREAVES and CHAMBERS RUSSELL, have been noticed in their connexion with the the Superior Court.

FRANCIS FOXCROFT was the son of Judge Foxcroft, already mentioned, and was born in 1693. He was graduated at Cambridge in 1712. His original appointment to the Court of Common Pleas was limited to the time that Judge Greaves should remain upon the bench of the Superior Court, but he continued to hold the place for nearly thirty years.

He was also Judge of Probate for Middlesex. He died at the age of 75 on the 28th of March, 1768.

His place of residence was in Cambridge. "He sustained many posts of public trust, honor and importance, and in them all his integrity and uprightness ever preserved him."

SAMUEL DANFORTH was the son of John Danforth, minister of Dorchester, and was graduated at Cambridge, in 1715. He was Judge of Probate as well as of the Court of Common Pleas in Middlesex, and was named a Mandamus Counsellor in 1774. He had been for many years a member of the Council and resided at Cambridge. Notwithstanding Judge Danforth filled an important place in the affairs of the province, and was long in public life, it is difficult now to trace his connexion with the events of the day.

His adherence to the cause of the King was unfortunate for the quiet of his declining years, and, for the time being, brought great odium upon his name. And yet he seems to have been either a moderate or a timid politician, for after having taken the oath of office as one of the Mandamus Counsellors, he publicly declared his determination not to act under his commission.

A convention of Middlesex County was held in August, 1779, and among their resolutions was one reciting that whereas Samuel Danforth and Joseph Lee had accepted commissions under the then late act, "we therefore look upon them as utterly incapable of holding any office whatever." The resolution closed with the expression of a determination "not to submit to courts thus constituted."

Judge Danforth held his place on the bench until the Revolution, and died October 2, 1777, at the age of 81. He was the father of the late Dr. Samuel Danforth of Boston who died in 1827.

ANDREW BOARDMAN was of Cambridge—frequently represented that town in the General Court, and was also Register of Probate for Middlesex County. He died May 20, 1769.

JOHN TYNG belonged to that part of Dunstable which was afterwards called Tyngsboro'. He died April 18, 1797, at the age of 93, and was buried in his own garden. He was the only one of the Judges on the bench of this court at the Revolution who was re-nominated under the new order of government. He continued upon the bench until 1786.

Judge Tyng was a graduate of Harvard in 1725, was long in public life, and held offices both civil and military, having been at one time a Colonel of a Regiment. He was distinguished as the "eccentric Judge Tyng," but the grounds of this characteristic distinction are not sufficiently understood to be repeated here.

He seems to have been a citizen of Boston before removing to Dunstable, and to have represented that town in the legislature during the term of ten years, the last of which was 1759.

RICHARD FOSTER was of Charlestown. He was more than forty years Sheriff of the County of Middlesex, and upon resigning that place was appointed to the bench of this court. He received the office of Judge in May, 1771, and died August, 1774, at the age of 82.

In a notice of his death by a cotemporary, he is said to have performed the many important trusts which were committed to him "with honor and approbation."

JOSEPH LEE was a graduate of Cambridge in the year 1729, and died December 5, 1782. He resided at Cambridge and was named as one of the Mandamus Counsellors in 1774. Although he took the oath of office under his appointment, he soon shrunk from the odium which was

Of the Judges of the Court of Common Pleas in this County I have already noticed in other parts of this work Bartholomew Gedney, John Hathorne, Jonathan Curwin, Nathaniel Saltonstal, Benjamin Lynde, Jr., Nathaniel Ropes, and William Brown, and shall not therefore again refer to them in their connexion with this court.

Samuel Appleton was born in England, Suffolk County, in 1625, and is supposed to have come to New England with his father in 1635. He resided in Ipswich, and was for many years a member of the House of Deputies, and subsequently was five years of the Board of assistants.

He held a couspicuous rank as a military man, and commanded an expedition in Philip's war, in 1675. It was engaged in the memorable attack upon the Narragansett fort, in December, of that year, by the Plymouth, Massachusetts and Connecticut forces, under the general command of Governor Winslow, in which the power of that tribe was effectually broken and subdued. More than a thousand of the enemy are said to have fallen on that occasion. He was named in the new charter as one of the Council, and was placed upon the first Bench of Judges of the Court of Common Pleas for Essex County, which place he held until his death, May 15, 1696, at the age of seventy years.

He was a brother of John Appleton, who was selected as one of the objects of Andros' revenge for the offence of the town of Ipswich, to which allusion has heretofore been made.

A nephew of Judge Appleton was, subsequently, a Judge of the same court, and among his descendants have been the distinguished President of Bowdoin College and some of the most eminent and respectable families in Boston.

Daniel Pierce was of Newbury. He frequently repre-

sented that town in the General Court, and held the office of Colonel in the Militia of the Colony.

At the Revolution in 1689, he was appointed one of the committee of safety who took charge of the affairs of the government. He died January 22, 1704, and if his epitaph may be taken as a true testimonial of character, he deservedly stood high in the public estimation.

> "Here lies interred a soul indeed
> Whom few or none excell'd,
> In grace, if any him exceed,
> He'll be unparalell'd."

WILLIAM BROWN was of Salem, was born in 1639, and was the son of the Honorable William Brown; a descendent of the same name was upon the bench of the Superior Court at the commencement of the Revolution. He was a man of great influence in the Colony and Province, and had been a member both of the House of Deputies and of the Council. At the Revolution in 1689, he took the popular side of the controversy, and was made one of the committee of safety. He was withal a man of great wealth, and munificient in his private charities and public benefactions.

He died at the age of 78, February 14, 1716, in the language of the historian of Salem, "full of years, usefulness and honors." His daughter was the wife of Chief Justice Lynde, the elder.

JOHN APPLETON was of Ipswich. He was born in 1652, and was the son of John Appleton, who was imprisoned by Governor Andros. He married a daughter of President Rogers of Harvard College, and his daughter married President Holyoke. He represented the town of Ipswich in the General Court as early as 1697, and from 1698, to 1723, was a member of the Council.

He also held a military commission and commanded a

regiment in the unfortunate expedition against Port Royal in 1707.

He was removed from the bench in 1732, by Governor Belcher, who had some apology for the measure in the advanced age of Judge Appleton, as he was then eighty years old. He however was made Judge of Probate the following year, and survived until 1739, when he died at the age of 87.

He had filled so many important places in public life, and his public and private virtues were so generally known, that his death was commemorated by eulogies and sermons from many of the clergymen of the province.

THOMAS NOYES was of Newbury, and had all the qualifications of a Judge which could result from his having been a captain in the Militia, and a representative in the General Court, and a member of the Council.

He died April 12, 1730, in the 82d year of his age.

JOHN HIGGINSON was the son of the Reverend Mr. Higginson of Salem, where he himself resided.

His business was that of a merchant, but he took an active part in the public affairs of his time, and held many important civil and military offices. He was at different times, a member of the House of Representatives and of the Council.

In 1709, he was the member of a committee to prepare a chart of the River St. Lawrence, with a view to aid a projected expedition against Canada, and he was selected as a guide in prosecuting the enterprise. The expedition failed altogether.

As Colonel of a regiment, however, he was more than once engaged in actual service against the enemy.

His life was one of great activity and usefulness, and he filled other places of honor and trust than those already enumerated. They had no connexion however with his

character as Judge, and are therefore omitted. He died in 1720, at the age of 73.

SAMUEL BROWN was the son of Judge William Brown already noticed, and was born October 8, 1669. His family influence and his wealth, as well as the ability with which he performed the duties of the offices which he was called to fill, gave him a high rank in the province. He often represented his native place, Salem, in the General Court, and, for many years, was a member of the Council.

Like the other leading men of his day, he was ambitious of military rank, and rose to the command of a regiment.

He was a distinguished friend and patron of the cause of education, and was no less respected in private life, than honored as a public man. Having succeeded his father upon the bench of the Common Pleas in 1715, he retained his connexion with the court until his death, having for many of the last years of his life, been Chief Justice of the court. He died at the age of 62, June 16, 1731.

JOHN BURRILL was of Lynn, in which town he was born October, 1658. He represented that town twenty one years, during ten of which he was Speaker of the House. As presiding officer of that body he possessed great popularity, and was admired as well for his affable manners and dignified deportment, as for the purity of his life.[1] In 1720, he was chosen a member of the Council, and was succeeded by Elisha Cooke as Speaker of the House. He was an universal favorite with all who knew him, and his death was greatly lamented. He died of the small pox, December 10, 1721, leaving no children. A younger brother of his was the ancestor of the Honorable

[1] Hutchinson says, "the House had been as fond of this Mr. Burrill as of their eyes."

James Burrill, the late distinguished Senator from Rhode Island in Congress.

Josiah Walcott was a merchant of Salem. Besides his connexion with this court and his having represented Salem in the General Court, little is known of his public or private life.

He died February 2d, 1729. He was, says Mr. Felt, "extensively useful and much respected."

Timothy Lindall was born at Salem, November 4, 1677, and was graduated at Cambridge, in 1695. He was many years a member of the House of Representatives from Salem, and in 1720, was chosen Speaker of that body in the place of Mr. Cooke whose election the Governor had negatived. He declined re-election the following year. He was also for many years a member of the Council. He was not a zealous partisan in politics, and seems to have shared to a good degree, the confidence of both the parties into which the people of the province were then divided. He died October 25, 1760, at the advanced age of 84 years.

He was an ancestor of the Honorable Thomas L. Winthrop, formerly Lieutenant Governor of the commonwealth.

John Wainwright was of Ipswich, and was a merchant. He was born in 1691, and was graduated at Cambridge, in 1709. He was frequently a representative, and for eight years clerk of the House. He was often employed in a public capacity, and, among other commissions, which he was appointed to execute, was that of treating with the Indians in Maine in 1725. He held the office of Colonel of a Regiment of Militia which seems to have been regarded as an office of much distinction, and only conferred upon the leading men in the province.

He died at the early age of 48, in the midst of his usefulness and his honors, September 1, 1739.

THEOPHILUS BURRILL, I suppose, belonged to Lynn, and was a nephew of Judge John Burrill. If so, he was born May 21, 1709, but I have learned nothing more of his history except his connexion with this court, and that his death, as I suppose, took place in 1737.

THOMAS BERRY was a physician of Ipswich. He was a native of Boston, was graduated at Cambridge, in 1712, and studied his profession with Judge Greaves of Charlestown, who was a physician. He removed to Ipswich in 1686. He had the requisite qualifications as a Judge, of having been a Representative, a Counsellor and a Colonel. He was Judge of Probate as well as of the Court of Common Pleas in Essex.

Amidst all his public employments he continued his practice as a physician, which was very extensive, and found time to peform his various duties with faithfulness and success. He died August 10, 1756.

BENJAMIN MARSTON was born in Salem, and after residing there many years he removed to Manchester, where he died in 1754. He had represented Salem in the General Court before his removal, and for some years previous to his promotion to the bench, had been sheriff of the county of Essex. He married a daughter of Judge Isaac Winslow of Marshfield.

JOHN CHOATE belonged to Ipswich, and at the time of his elevation to the Court of Common Pleas, possessed all the qualifications, civil and military, which seem to have been regarded in selecting the Judges for this court.

Thus he had been a Representative, a Colonel and Counsellor, and in addition to these was made a Judge of Probate and Chief Justice of the Court of Common Pleas. He retained his judicial offices and honors until his death in 1766.

HENRY GIBBS was a native of Watertown, and was born May 1709. He was graduated at Cambridge, in 1726, and settled in Salem, where he became a merchant. He married a daughter of Secretary Willard for his second wife. The last year of his life, he represented Salem, in the General Court, and was clerk of the House. He died at Boston, February 1759, while engaged in his legislative duties. He retained his place upon the bench until his death.

JOHN TASKER was of Marblehead. He retained his office as Judge until his death, November 9, 1761, and at the time of his death, was a representative in the General Court from Marblehead.

BENJAMIN PICKMAN was a merchant, and resided in Salem, where he was born in 1708. He was successively a Representative, a member of the Council, a Colonel of a Regiment and a member of this court. He left the bench in 1761, and died August 20, 1774.

CALEB CUSHING belonged to Salisbury, and remained upon the bench until the Revolution, and after the court had been re-organized, he became its Chief Justice. He was a member of the Council that was chosen immediately before the Revolution, and as such, by invitation from the first Provincial Congress, met and acted with that body.

STEPHEN HIGGINSON belonged to Salem, and was born July 1716. He held the office of Judge only about three months. He died October 12, 1761, at the early age of 45.

ANDREW OLIVER belonged to Salem, and was much more eminent in private life, as a scholar and a man of science, than as a politician. He however was frequently called to represent his town in the General Court, and was named as one of the "Mandamus Counsellors," appointed by the Crown. So great was the odium in which this

office of counsellor was held, that he resigned the appointment.

He was a son of Lieutenant Governor Oliver, and nephew of the Chief Justice of that name. He was graduated at Cambridge in 1749, and through life cultivated a taste for letters. He was one of the founders of the American Academy of Arts and Sciences, and contributed many of the valuable articles which are contained in the first volume of the transactions of that Society.

He was also a member of the Philosophical Society of Philadelphia. He published an "Essay on Comets," in 1772, which gained him much reputation. He died in 1799, at the age of 68. He remained upon the the bench of the Court of Common Pleas until the Revolution, but his political opinions probably were not congenial to the popular feeling of the day, and he ceased to take any part in public affairs after the overthrow of the royal government.

William Bourn was a son of Sylvanus Bourn of Barnstable, and was graduated at Cambridge in 1743. He settled in Marblehead, and died there at the early age of 47, August 12, 1770.

He left a high reputation for private worth and social virtues, as well as for faithfulness and ability in the performance of his many public duties.

Peter Frye was born in Andover, in 1723, and was graduated at Cambridge in 1744. In 1755, he became the teacher of the grammar school in Salem, where he afterwards resided. He held at one time or another the offices of Colonel of a Regiment, Register of Probate and Collector of the Excise.

Notwithstanding the commanding influence which he once exercised in the county, he found it necessary to leave the country at the Revolution on account of his political

sentiments. He went to England where he resided near London, until his death in 1820, at the advanced age of 98.

The last appointment that I have found, of Judges to this court, bears date January 15, 1772, and embraces Caleb Cushing as Chief Justice, Andrew Oliver, William Brown and Peter Frye. The vacancy created by the promotion of Judge Brown to the Superior Court seems not to have been supplied, and Cushing, Oliver and Frye consequently constituted the last bench of Judges of this court before the Revolution.

The Judges commissioned in 1775, as before stated, if they acted under their appointments, held their offices for a short time only, for in 1779, the court consisted of Caleb Cushing, Chief Justice, Benjamin Greenleaf of Newburyport, Timothy Pickering of Salem, and Samuel Holten of Danvers, Associate Judges.

PLYMOUTH COUNTY.

The first term of this court, held under the charter,[1] which appears from its records, was in June, 1702. For the eleven successive years the names of the Judges do not appear upon the records, so that possibly, the names of all who constituted this court during the Provincial government, may not be contained in the following list of Judges.[2]

[1] It is probable that until 1702, the organization of the courts in the Old Colony, known as the Associate Courts, were continued. These were originally established in 1685, in the Counties of Plymouth and Bristol. During the administration of Andros they assumed the name of Courts of Common Pleas. In 1689 the Associate Courts were restored, and the Judges appointed for Plymouth, were Nathaniel Thomas, Ephraim Morton, and Thomas Howard, and these were again appointed in 1690 and 1691. (Baylies.)

[2] For the list and residence of the Judges of this county, I am indebted to the politeness of J. B. Thomas, Esq. Clerk of the courts in Plymouth, who

NATHANIEL THOMAS, 1702, to 1712.
JOHN CUSHING, 1702, to 1728.
James Warren, 1702, to 1714.
Joseph Otis, 1703, to 1714.
ISAAC WINSLOW, 1712, to 1738.
NATHANIEL THOMAS, 1715 to 1738.
Seth Arnold, 1717, to 1721.
ISAAC LOTHROP, 1721, to 1731, 1739, to 1743.
Josiah Cotton, 1729, to 1747.
NICHOLAS SEVER, 1731, to 1762.
John Cushing, 1738, to 1747.
Thomas Clapp, 1743, to 1770.
Peter Oliver, December 12, 1747, to 1756.
Isaac Lothrop, 1748, to 1749.
Elijah Cushing, 1751, to 1762.
Thomas Foster, 1756, to 1774, Revolution.
John Winslow, 1762, to 1774.
Gamaliel Bradford, 1762, to 1774, Revolution.
Josiah Edson, 1771, to 1774, Revolution.

Of the foregoing names, Nathaniel Thomas, both the John Cushings and Peter Oliver, have been noticed in their connexion with the Superior Court.

JAMES WARREN was of Plymouth, and his connexion with the court continued from June, 1702, to June, 1714. He was the grand-father of Honorable James Warren of Revolutionary memory. He died in May, 1715. His son James was many years sheriff of the county of Plymouth. He was a lineal descendant from Richard Warren who came over in the May Flower His death occurred very suddenly while on his way to attend the General Court of which he was a member. He is spoken of by his cotemporaries as "a gentleman of great integrity and capacity, and one whose loss was universally lamented."

gratuitously examined the records of the court for the purpose, although the favor of the information was asked by one who had no other claims upon his kindness than those of a stranger.

Joseph Otis was of Scituate, and is probably the one mentioned by Mr. Dean, the Historian of that town, as having been the son of John Otis, and born in 1675. He was of the family, a branch of which settled at Barnstable, and from which James Otis, Jr. was descended.

Isaac Winslow was of Marshfield, and was the only son of Governor Josiah Winslow. He was appointed Judge of this court in 1712, and was promoted to the place of Chief Justice in 1728. In 1718, he was also appointed Judge of Probate for the county of Plymouth.

He resigned his office of Chief Justice in May, 1738, and died in December, of the same year, at the age of 67. He is said by Dr. Elliot to have been the principal military officer in the colony.

In an obituary notice of him, published in the Boston Evening Post, he is represented as having been a man of great integrity, fortitude and humanity, of singular modesty, uncommon generosity, and possessing universal confidence and esteem. He was for more than 30 years a member of the Council.

Nathaniel Thomas was the son of Judge Thomas of the Superior Court, and succeeded Judge Winslow as Chief Justice of this court. He belonged to Plymouth, and died at his son's house in Plympton, while upon a visit there in Feburary, 1739, at the age of 75.

In the cotemporary notices of his death he is honorably mentioned as having acquitted himself with justice and integrity in the performance of his various official duties.

Seth Arnold, I suppose, belonged to Duxbury, and was the son of the Rev. Mr. Arnold of Marshfield.

Isaac Lothrop was of Plymouth, and passed through the various grades of civil and military rank till he arrived at the place of Chief Justice of the Court of Common Pleas in the one, and that of Colonel in the other. He

had been a member of the Council and sheriff of the county, and, in the language of a writer in the Evening Post, "in all posts of trust he behaved with great fidelity, and to good acceptance."

He died September 10, 1743, in the 71st year of his age.

Josiah Cotton was of Plymouth, and was the son of the Rev. John Cotton of that town, whose father was the distinguished clergyman of Boston of the same name. He was born January 8, 1679, and was graduated at Cambridge, in 1698. He then engaged in teaching school in Marblehead, where he studied divinity and preached for about two years.

In 1704, he returned to Plymouth, and pursued the employment of a teacher for seven years. He occasionally preached to the Indians in Plymouth and the vicinity in their own tongue, which he had acquired. He held at one time or another a great variety of civil offices, such as Clerk of the Court of Common Pleas, Register of Deeds, Register of Probate and Judge of this Court, and died in 1756, at the age of 76 years.

He is said by the Historian of Plymouth, from whose work I have collected this sketch, to have possessed a strong and sound mind—to have been fervently pious and indefatigable in the discharge of all the duties of his various and honorable stations in life.

His daughter was the mother of Chief Justice William Cushing, and a son succeeded him in the office of Register of Deeds for the county of Plymouth.

Nicholas Sever belonged to Kingston, and was at one time Chief Justice of this court. He was originally from Roxbury and was graduated at Cambridge, in 1701. He studied theology, and at one time preached as a candidate for settlement in Haverhill, where he received "a call." He was afterwards settled in Dover, New Hampshire,

from 1711, to 1715. He then removed to Plymouth county, where he continued to reside until his death. He died April 7, 1764, at the age of 84.

His son, Honorable William Sever, was for some years Judge of Probate for the county of Plymouth.

THOMAS CLAPP belonged to Scituate, and from Mr. Dean's history of that town, I have derived the following facts in relation to his history. He was born in Scituate, in 1705, and was graduated at Cambridge, in 1725.

He studied theology, and was settled as a minister over the first church in Taunton. After a few years he removed to Scituate, where his taste seems to have taken a more warlike turn, for we find him at the head of a regiment with a Colonel's commission. Whether this prepared him for the bench, or his judicial duties fitted him for those of the field, it does not appear. He held both these offices, and continued to hold that of Judge for nearly thirty years. He married for his first wife, a daughter of Judge George Leonard of Norton, and for his second, a daughter of Honorable John Chandler of Worcester.

ISAAC LOTHROP was a son of Judge Lothrop, already mentioned, and a merchant in Plymouth. He was a man of great influence in his day, and enjoyed to a high degree, the public confidence and respect. He died at the early age of 43, on the 26th of April, 1750. His associates upon the bench pronounced eulogies upon his character, in which they expressed the highest regard for his memory, as an upright Judge, and a virtuous and honorable man.

The inscription upon his monument exhibits his character as that of an "unbiassed Judge," a "faithful officer,"[1] a "sincere friend," and "an honest man," and adds,

[1] He was Lieutenant Colonel of a Regiment.

"Had virtue's charms the power to save
Its faithful votaries from the grave,
This stone had ne'er possessed the fame,
Of being marked with Lothrop's name."

ELIJAH CUSHING, I suppose, from a note in Dean's History of Scituate, was a son of Judge John Cushing the 2d. He resided in Pembroke. His son Joseph, was afterwards Judge of Probate for this county, and a daughter married the distinguished General Lincoln, of the Revolutionary army.

He died very suddenly, while on a visit at Boston, June 26, 1762, at the age of 64. "He was always conspicuous," says a writer in the Evening Post, "for fidelity and perseverance in the discharge of the various duties of his posts, civil and military." His character is spoken of as highly estimable, both in private and public life.

THOMAS FOSTER belonged to Plymouth, and was, as I suppose, a son of Deacon Thomas Foster. He taught school in that town for some years after 1749. He was liberally educated, having been graduated at Cambridge.

I have learned little of his history, but if the Judge was the person supposed, he died in 1777, at the age of 74.

JOHN WINSLOW. The name of General Winslow, fills so considerable a space in the history of Massachusetts, that he seems to deserve a particular notice among the Judges of her courts, although little is known of him in that connection.

He was the presiding Justice of the Court of Common Pleas in his native county of Plymouth, for the term of twelve years, and held that office at the time of his death.

He was of the family of Governor Winslow, and was born in Marshfield, in 1703. His father, Isaac Winslow, who was a son of the Governor, had been Chief Justice of the same court for the term of ten years, and left the bench in 1738.

General Winslow was educated as a merchant, and pursued mercantile business as a means of livelihood.

Early in life, however, he became connected with public affairs, and among other offices, he was for some time Register of Probate for the county of Plymouth.

Soon after this appointment he was commissioned as a military officer, and entered upon a brilliant and successful career. An expedition was fitted out under the direction of the crown, against Cuba, then, as now, under the government of Spain, and the command of a company was on that occasion given to Mr. Winslow. He took an active part in the enterprise, but it altogether failed. The troops belonging to the British army, were attacked and swept off by disease to such a degree, that of the five hundred men who had been furnished by Massachusetts, fifty only returned from this disastrous campaign.

In 1744, he was in command of a company which formed a part of an expedition then fitted out against the French in Nova Scotia, and ten years afterwards he led an expedition against the Indians in the eastern part of Maine.

In these various enterprises, his courage and conduct had been such as to secure him general confidence, and when, in the year 1755, it was desirable to raise a new army to carry on the war with the French, General Winslow, who held the rank of Lieutenant Colonel in the expedition, was able to enlist two thousand men in the space of two months.

The enterprise in which he now bore a part, was among the most memorable in the annals of New England, not so much on account of the magnitude of its consequences, as the incidents that marked its progress.

The whole expedition was put under the general command of Colonel Monckton, but the chief responsibility

rested upon Lieutenant Colonel Winslow, who was at the head of the provincial troops.

The destination of this army was Nova Scotia, which was claimed by Great Britain, under the treaty of Utrecht.

The inhabitants of a considerable portion of the country were French, who had been suffered to retain their property and religion, under an understanding that they would in the case of a war with France remain neutral. They were accordingly known as the "French Neutrals," and the early history of Massachusetts contains frequent references to them as a people.

From a real or supposed violation of their neutrality, and the danger which was apprehended from their number and concert of action, it was thought to be necessary to remove them from the country, and to scatter them through the English colonies.

The execution of this severe, not to say odious measure, devolved upon General Winslow, whose good judgment, forbearance and lenity in performing so ungracious a duty, met with universal approbation.

There was in the character and manners of this people more of romance than ordinarily is found in civilized life. They realized the poet's dream of Arcadian simplicity, honesty, happiness and contentment. Attached to their religion, fond beyond measure of their homes, possessed of comfortable if not independent estates in their well cultivated and well stocked farms, they formed a most interesting community.

As nothing but stratagem could avail in inducing them to bring themselves within the power of the invading army, that was resorted to, and about five hundred men in the district of Minas were thus seized. The families of these were also secured, making a total of nearly two thousand persons in that district alone. To prevent any

escape the country was laid waste by fire. There were more than two hundred and fifty houses burned in a single district.

The historian of Nova Scotia,[1] describing this scene, says, the soldiery "stationed in the midst of a beautiful and fertile country, suddenly found themselves without a foe to subdue and without population to protect.

"The volumes of smoke which the half expiring embers emitted, while they marked the site of the peasant's humble cottage, bore testimony to the extent of destruction.

"For several successive evenings the cattle assembled around the smouldering ruins, as if in anxious expectation of their masters, while all night long the faithful watch-dogs of the Neutrals howled over the scene of desolation, and mourned alike the hand that fed, and the house that sheltered them."

The whole population were forced on board ships and carried off into exile. More than a thousand were distributed through Massachusetts, being divided among the towns and supported for a while at the public charge. But they were never reconciled to their state of bondage and dependence, and never mingled with the inhabitants or became incorporated with them. Many of them died, and some returned at last to their former homes, and their history is lost.

General Winslow having executed this unpleasant commission, returned to Massachusetts in disgust at the treatment to which the provincial troops were subjected by the officers of the regular army.

He did not however long remain inactive. War was then raging all along the frontier settlements. The year

[1] Halliburton.

1755, became memorable not only by the defeat of General Braddock, but by disasters upon the northern frontier. The following year General Winslow was in command of an expedition under Lord Loudon against Crown Point, but accomplished little by the enterprise. He however received on this occasion a commission as commander in chief of the provincial troops, from the Governor of New York.

The next year, 1757, he received from Governor Pownal, the appointment of Major General of the Massachusetts forces, and this commission was renewed by Governor Bernard in 1762.

Nor was it in military life only that he received marks of public confidence. He filled many important civil posts of honor, especially that of counsellor, which was ever regarded as one of the most honorable in the province under its charter form of government.

At the age of fifty-nine, without any previous preparation or study, he was made the Chief Justice of this county.

How he succeeded in his new sphere of duties—or how the stern soldier and exemplary officer was able to hold the scales of justice between his fellow citizens, does not appear. He retained the office till his death, May 17, 1774, at the age of 71.

His cotemporaries spoke of his character in the obituary notices of him which have been preserved, in terms of high eulogy, and the long time during which he retained the public confidence seems to have justified such commendations, for he was alike esteemed as a gentleman, a soldier, and a magistrate.

GAMALIEL BRADFORD was of Duxbury, and was the grand-father of Alden Bradford, late secretary of the Commonwealth, whose father was Colonel Gamaliel Bradford of the Revolutionary Army. He represented that town

many years in the Legislature, and afterwards was for several years, a member of the Council, having resigned his seat at that board in 1770, on account of age and bodily indisposition.

Josiah Edson was of Bridgewater, and one of the Mandamus Counsellors. He had been a deacon of the church in that town, and a man of great influence. His political opinions however rendered his remaining in the Province uncomfortable, and he left it at the time of the Revolution and went to New York, where he died soon after leaving Massachusetts. Among the measures adopted by the people to mark their disapprobation of his political course, they refused to sing when, as was customary, he stood up in church and read the psalm to the congregation, on the Sabbath.

The last term of this court before the Revolution was held in July, 1774.

From that time until October, 1777, there is no record of any court having been held in this county.

A commission however had been issued on the 26th of October, 1775, to William Sever, John Thomas, Nathan Cushing and John Torrey.

It is doubtful whether these Judges ever acted under their commissions, for on the 10th of April, 1777, a commission was issued to Daniel Johnson, John Cotton, John Cushing and John Turner, and still other commissions to Peleg Wadsworth, in July, and Benjamin Willis, in September, of the same year.

There was therefore an entire change in the members of this court at the time of the Revolution, and the limits of this work preclude our extending it beyond this period.

BRISTOL COUNTY.

As the records of this county are somewhat mutilated and defective, it is possible that the names of some of its Judges have not been discovered, and may consequently have been omitted, in the following list. The times during which some of them held their offices have not been ascertained. [1]

The first term of which there is any record was held October 13, 1702, and the last term of the court was holden in June, 1774. [2]

NATHANIEL BYFIELD, 1702, to 1710, and from 1716, to 1725.
John Brown, 1702, to 1709.
THOMAS LEONARD, 1702, to 1713.
Ebenezer Bronson, 1702, to 1708.
NATHANIEL PAINE, 1710, to 1729.
Benjamin Church, 1708, to 1714.
Henry McIntosh, 1709, to 1725.
Simon Davis, was upon the bench in 1713.
George Leonard, 1716.
GEORGE LEONARD, 1725, to 1730, 1733, to 1740, 1746 to Rev.
SETH WILLIAMS, 1724, to 1729, and from 1730 to 1760.
Samuel Vial, 1725, to 1726.
Nathaniel Hubbard, 1728, to 1745.
Thomas Church, 1729, to 1745.
Job Almy, 1740, to 1747.
Stephen Paine, 1746, to 1749.
Ephraim Leonard, 1747, to the Revolution.
Stephen Leonard, time not ascertained.
Samuel Willis, 1749, to 1760.
James Williams, 1760, to the Revolution.
Zephaniah Leonard, 1761, to 1766.

[1] For the list of Judges in this county, as well as for aid in the index to this work, I am indebted to my friend and associate, C. W. Hartshorn, Esq., of Worcester.

[2] A court however had been commissioned in 1699, under a new arrangement of which John Saffin, Thomas Leonard, Nicholas Peck, and John Brown were Judges.

Elisha Tobey,[1] 1766, to Revolution.

Timothy Fales,[2] appointed and left the bench in 1760.

Of those who are named in the foregoing list, I have already noticed Nathaniel Byfield, Nathaniel Hubbard, and John Saffin.

NICHOLAS PECK belonged to Rehoboth, but I have learned little of his history beyond his connexion with the affairs of that town, and the rank of Lieutenant to which he attained as a military man. He was one of the Associates who were authorized to hold County Courts in Bristol County in 1685, but was not re-appointed by Andros when he assumed the government.

JOHN BROWN was the grand-son of John Brown, an early settler of Taunton and Swansea. At the organization of County Courts in the Plymouth Colony under Governor Andros, he was made one of the Associate Judges for Bristol County, and upon a new organization of the court in the year 1689, he was again made an Associate Judge of the same court when it assumed the name of the Common Pleas, and remained a member of the court until 1709.

A captain of the same name, and whom I suppose to have been Judge Brown, commanded a company in an expedition under Colonel Church, in 1704, and is supposed to have resided in Swansea.

THOMAS LEONARD was the son of James Leonard, the ancestor of the distinguished family that bear that name in the Old Colony. In a notice of this family published in the 3d volume of the Historical Collections, 1st series, Thomas is said to have been "a distinguished character. He held the office of a Justice of the Peace, a Judge of the court, a physician, a field officer and was eminent for piety."

He was one of the Associates appointed in 1685, to hold

[1] Judge Tobey belonged to Dartmouth. [2] Mr. Fales was of Taunton.

County Courts in Bristol, but during the government of Andros held no judicial office. In 1690, he was again appointed to the same place, and upon the organization of the courts under the new charter, was made a Judge of the Common Pleas for Bristol County.

He was a native of Wales, and came into the Colony with his father when a child, and engaged with his father in the business of manufacturing iron. He died at an advanced age in 1713, and an Eulogy to his memory was published, the same year, by the Rev. Mr. Danforth of Taunton.

NATHANIEL PAINE originally belonged to Swansea, but became one of the early settlers of Bristol, now in Rhode Island. He succeeded Colonel Byfield, as Judge of Probate, in 1710, and in the same year, was made a Judge of the Court of Common Pleas. He remained upon the bench until 1729, during a part of which time he was Chief Justice of that court. He was long engaged in public life, and among other posts of honor which he filled, was that of Counsellor of the Province. He was the ancestor of the families of that name in Worcester, through his son Timothy, who was named as one of the Mandamus Counsellors in 1774.

BENJAMIN CHURCH. When it is stated that the subject of this notice was Colonel Church, the famous warrior, it will be perceived that his history could not be given without combining with it a history of the long and bloody wars in which the colonies were embroiled with the Indians for the many years in which he commanded the colony troops. His name and exploits are too familiar with every one who is at all acquainted with the early history of Plymouth and Massachusetts, to render it necessary or proper to occupy any considerable space in recapitulating his adventures and sacrifices here.

He was born in Duxbury, in 1639, and was brought up to a mechanical trade.

He removed in 1674, from Duxbury to Saconet (Little Compton) which belonged to Massachusetts, until 1741.

He afterwards removed to Bristol, and represented that town in the Legislature of Massachusetts, after the union of the colonies under the new charter. During Andros' administration he was one of the Judges of the Court of Common Pleas of Bristol county, but held the office for a short time only.

From Bristol he removed to Fall River, and once owned that stream and territory. He afterwards returned to Little Compton, where he died from an injury received in falling from his horse, January 17, 1718, at the age of 78.

As a partisan warrior, the fame of Colonel Church is unrivalled in the history of Massachusetts. He seems to have been raised up by Providence, to counteract the designs of that artful and deadly enemy of the English, Philip of Pokanoket. But his courage and prowess were not confined to one scene of action. Wherever the state called for his services he was found in the field, and although he was repaid by the province only with meanness and ingratitude for his sacrifices, he was her boldest champion and her bravest warrior, and history has done that justice to his memory, which was denied to him while living.

George Leonard was of Norton, and the son of Judge Thomas Leonard. Having held a military commission, he was commonly known as "Major George." He was upon the bench but a short time, as he was commissioned in 1716, the same year in which he died. He is styled in a poem, published on the occasion of his death, "the prudent, pious, worthy and worshipful Major George Leonard, Esquire." As I have not seen the production I am

not advised how all these epithets were wrought into metre or rhyme.

GEORGE LEONARD was the son of "Major George," and grand-son of Judge Thomas Leonard. He was Judge of Probate as well as of the Court of Common Pleas.

From the few facts I have been able to gather of his history, it would seem that he was a member of this court at three or four different periods.

The first, from 1725, to 1730, the second, from 1733, to 1740, when he was dismissed from office for having been concerned in passing bills of the "Land Bank," contrary to law. In 1746, he was again restored to his place upon the bench, and I find him a member of the court in 1760. He continued to hold the office until the Revolution. He belonged to Norton, and was known as "Colonel George," to distinguish him from his father.

His son George was at one time a member of Congress. Like the other members of his family, Judge Leonard survived to a ripe old age exceeding eighty years.

EPHRAIM LEONARD was a son of Major George, and belonged also to Norton. He was also a military officer as well as a Judge. He was the father of Daniel Leonard formerly of Taunton, who left the country at the Revolution, and afterwards became Chief Justice of the Superior Court in Bermuda, and who has already been noticed in this work.

STEPHEN LEONARD was a nephew of Judge Thomas Leonard and the father of Judge Zephaniah Leonard. I have taken the fact that he was a Judge of this court from the 3d volume Massachusetts Historical Collections, but I have not ascertained when or how long he was upon the bench.

ZEPHANIAH LEONARD was appointed Judge of this court in 1761, and like most of the public men in his day held

a military as well as a civil office. He was of Raynham, and represented that town in the General Court.

Job Almy was of Tiverton, and represented that town in the General Court, while it belonged to Massachusetts.

Thomas Church was the son of Colonel Church, and lived at Saconet. He often represented Little Compton in the Massachusetts Legislature, and sustained through life an honorable rank and reputation. He died in 1746.

Samuel Willis was of Dartmouth, and is said to have been a "gentleman distinguished in life by several offices, civil and military, which he discharged with a singular cheerfulness and fidelity, to general acceptance." "In the decline of life was more retired, ripened fast for heaven and went to his grave in peace." He died October 3, 1763, at the age of 79.

Seth Williams was of Taunton, where he died May 13, 1761, at the age of 85. He was highly respected as a citizen and a public officer. He represented that town nine years in the General Court, and was a member of the Council eleven years. He was Chief Justice of the Court of Common Pleas thirty-six years, and resigned the place in May, 1760. From that time till his death, he withdrew from public life.

Stephen Paine belonged to Bristol, now in Rhode Island, and represented that town in the Legislature of Massachusetts while it belonged to this province and during the time he was a Judge of this court.

James Williams was of Taunton, and upon the re-organization of the courts during the Revolution, was made Chief Justice of the Court of Common Pleas in Bristol, but left the bench previous to 1780.

Of the others who have been members of this court I have found no memorials beyond what are found in its records.

BARNSTABLE.

It is unfortunately out of my power to obtain any thing like a complete list of the Judges of this court. Timothy Reed, Esq., the present Clerk of this court, politely informed me, in reply to a request that he would furnish such a list, that the records of the court were destroyed by fire in 1827. The few whose names I have ascertained from newspapers, and other memoranda, I give without reference to order in point of time.

In 1689, the Associate Courts which had been established in 1685, but discontinued during Andros' administration, were revived, and Jonathan Sparrow, and Stephen Skiff were appointed its Judges.

DANIEL PARKER who belonged to Barnstable, died while a member of this court, December 23, 1728, at the age of 59 years.

PETER THACHER was commissioned as Chief Justice, September 2, 1731. He was the son of Colonel John Thacher, of Yarmouth, was born in 1645, and was one of a family of eighteen children. He was first appointed to the bench of this court in 1720. His residence was in Yarmouth, where his son Peter, Jr., the father of the late Judge George Thacher, of the Supreme Court, was born.

He was many years a member of the Council, and in 1729 was appointed to the care and government of all the Indians in the county of Barnstable in civil and criminal matters. He died in the 71st year of his age. "As a Judge," it is said, "he was full of compassion, and when transgressors were before him he appeared always to desire their reformation more than their punishment."

JOSEPH LOTHROP was appointed a Judge of this court in 1731. He belonged to Barnstable, and was descended from John Lothrop, the first minister of that town, who

was educated at Oxford, and was among the distinguished literary men in New England.

Ezra Bourn was appointed Judge in 1731. He was the son of Shearjashub, and grand-son of Richard Bourn, one of the early emigrants to New England, who settled in Sandwich, and devoted himself to christianizing the Indians in that neighborhood.

Judge Bourn inherited from his father and grand-father a valuable estate acquired from the natives of Marshpee.

He was for several years Chief Justice of the court and died in September, 1764, at the age of 88 years.

His descendants have embraced many able and distinguished men, and at one time, 1794, there were three of his grand-sons in Congress, one from Massachusetts, one from Rhode Island and one from New York.

Shubael Baxter was appointed a Judge of this court at the same time that Mr. Thacher was made its Chief Justice, but I have been unable to discover any thing more of his history.

John Doane was appointed a Judge of this court in 1736. He belonged to Eastham, and was undoubtedly a descendant of Deacon John Doane, who with Governor Prince was one of the original settlers of that town, and whose descendants have been among the most respectable families in that town.

John Davis of Barnstable, was appointed a Judge of the court at the same time with Mr. Doane, but I have not learned any thing further of his history.

David Crocker was commissioned as Judge in March, 1747, and remained upon the bench until 1758, when he was succeeded by Thomas Smith.

John Thacher of Barnstable, was appointed to the bench of the Common Pleas, June 2, 1758, and held the

place, as I have reason to believe, until he was succeeded by Edward Bacon in 1764.

He was the youngest brother of Judge Peter Thacher already mentioned, and was born January, 1674, and among other offices which he held were those of Register of Deeds and Colonel of the Militia. His epitaph is in the following words, "Here lies interred the body of the Hon. John Thacher, who after a long life of usefulness and faithfulness, in the several military offices, and of eminent exemplariness in the religion of Christ, and in the hope of eternal life, died March 17, 1764, in the 90th year of his age."

THOMAS WINSLOW was made a Judge June 2, 1758, and continued upon the bench until the Revolution.

THOMAS SMITH came upon the bench at the same time with Judges Thacher and Winslow, and continued to be a member of the court until the Revolution. He resided in Sandwich and was by profession a Physician. After the courts had been again organized during the revolution he was re-appointed to the place he had filled under the royal government.

SYLVANUS BOURN was commissioned as Judge, June 2, 1758, but I have reason to believe he had previously held the same office for several years.

He was the son of Meltiah Bourn of Sandwich. His own residence was in Barnstable, where he was for many years in successful and extensive practice as a lawyer. He had been regularly educated for the profession, and his practice extended into other counties than that in which he resided.

He was for more than twenty years a member of the Council, and during that time was frequently called upon to act by special commission as a member of the Superior Court.

He held the office also of Judge of Probate for more than twenty years, and at the time of his death was Chief Justice of the Court of Common Pleas.

In military life too, he rose to distinction and held the command of a regiment.

His cotemporaries speak of him as a man of most amiable and excellent qualities in private life, of sprightly wit, polite deportment and deeply imbued with religious principle.

He was the father of Judge William Bourn, who has been mentioned as a member of the Court of Common Pleas in Essex county.

Judge Bourn died September 18th, 1763, at the age of seventy years, after having long enjoyed a great share of the public confidence, and faithfully performed his many public duties.

John Otis was for thirteen years Chief Justice of the Court of Common Pleas, and as he died November 30, 1727, he must have been early appointed to the place.

He was born in Hingham, in 1657, and while young, removed to Barnstable, where he continued to reside during the remainder of his life, being seventy years old at his death.

Besides his office of Chief Justice he was also Judge of Probate for twenty-one years, and as a military man, rose to the command of a regiment. In all his official stations he performed his duties with great honor to himself, and to the general acceptance of the public, and justly commanded a great share of influence in the province.

He owes his fame, however, among posterity, to the name of his distinguished grand-son who was the first to apply the Revolutionary torch to the combustible materials which had been accumulating for years before the colonies struck the decisive blow, against the mother country.

Two of his sons, John and James, were Judges of this court.

JOHN OTIS, son of the Chief Justice, just named, was commissioned as Judge in August, 1746.

He resided in Barnstable, and was a representative from that town in the General Court. From the House he was promoted to the Council, and was a member of that body at the time of his death, in 1756.

JAMES OTIS succeeded Colonel Bourn as Chief Justice of this court, in February, 1764, and also as Judge of Probate. He continued at the head of the court until the Revolution.

He has been so fully noticed in his connexion with the office of Attorney General, in another part of this work, that there is no occasion to enlarge any farther upon his history here.

EDWARD BACON was made a Judge of this court at the same time that Colonel Otis was made Chief Justice in 1764, and was the successor of John Thacher.

He belonged to Barnstable, and represented that town in the General Court.

He held the office of Judge until the Revolution.

The first commission issued to Judges in the county of Barnstable by the "Government and People of Massachusetts Bay," bears date October 11, 1775, and was directed to James Otis as Chief Justice, Daniel Davis of Barnstable, Nathaniel Freeman of Sandwich and Richard Baxter of Yarmouth, as his associates.

DUKES COUNTY.

The records of this county show that a Court of Common Pleas had been organized and held its meeting as early as September 29, 1691. But as the charter of William and Mary did not arrive in Massachusetts until May,

1692, and no meeting of the Legislature was held until some time subsequent to that period, the courts of the county probably continued for some time to act under their former organization.

Indeed up to the time of this charter, the Islands constituting Dukes county were a part of the province of New York, having been granted to the Duke of York, (from which circumstance the county took its name) in 1664.

The organization of the court under the new charter probably took place in 1697, as the number of Judges was then for the first time four, as provided by law, it having been under the former regime but three.[1]

Those who constituted the court so far as ascertained from time to time were as follow:

MATTHEW MAYHEW 1697, to 1700.
THOMAS MAYHEW, 1697, to 1715.
Richard Sarson, 1697, to 1700.
James Allen, 1697, to time not ascertained.
Benjamin Skiff, in 1700.
Joseph Norton, in 1700.
Paine Mayhew, time not ascertained.
Zaccheus Mayhew, time uncertain.
Ebenezer Allen, time uncertain.
Benjamin Smith, in 1738.
John Chipman, time uncertain.
ENOCH COFFIN, in 1761.
MATTHEW MAYHEW, 1768, to the Revolution.
JOHN ALLEN, in 1761.
Ebenezer Smith, 1761, to 1772.

[1] I am happy to acknowledge the obligation I am under to Daniel Fellows, Esq., Clerk of the Courts of Dukes county, for his aid in obtaining the list of Judges here presented. The records, however, of the court are incomplete, and I have been obliged to supply, so far as I could, this defect from other sources of information. Thus the records from 1716, to 1722, are not preserved. From 1742, to 1762, they do not contain the names of the Judges who sat during that period, and the same omission occurs from 1763, to 1674.

John Sumner, October 16, 1761, to the Revolution.
John Newman, in 1761.
Josiah Tilton, June 8, 1764, to the Revolution.
Joseph Mayhew, December 10, 1771, to the Revolution.

The first term of the court after the authority of the Royal Governor had been annulled at the commencement of the Revolution, was held in March, 1777. Commissions however had been issued in October, 1775, to Joseph Mayhew, James Athearn, John Worth, and Shubael Cottle, as Judges of the Court of Common Pleas, for Dukes County. Worth and Cottle were of Chilmark, and Athearn of Tisbury.

MATTHEW MAYHEW was the grand-son of Thomas Mayhew, one of the earliest settlers, and for many years Governor of Martha's Vineyard. His father's name was also Thomas, and has been preserved with just veneration as having been the earliest to engage in the work of christianizing the Indians upon this Island. He was lost at sea at the early age of 37, in 1657. In 1681, his son Matthew succeeded his grand-father in his civil and military honors. To these duties he added that of a preacher to the Indians, and was, moreover, an author to some extent, having published a small work in 1694, on the success of the gospel among the Indians of Martha's Vineyard. He died in the year 1710.

THOMAS MAYHEW was a brother of Matthew, and survived him until 1715. He was upon the bench when the charter of William and Mary united Martha's Vineyard with the Province of Massachusetts, and continued to hold a place as a member of that court until his death.

RICHARD SARSON was also upon the bench when the charter of William and Mary arrived, and continued to hold the office until 1700.

I have learned little of his history, but find him distin-

guished as "Captain" Sarson, as early as 1675. He was then sent by Governor Mayhew, with a small military force, to ascertain the disposition of the Indians residing at the west end of the Island, towards the English in regard to the war that Philip was then waging against the colonists.

The manner in which he executed this trust appears to have been satisfactory, and the tribe which had enjoyed the benefits of Mr. Mayhew's christian ministrations remained faithful to the English during that fearful struggle known as Philip's war.

ENOCH COFFIN belonged to Edgartown, and died in 1761, at the age of 83, leaving ten children. He had represented that town in the General Court, was Register of Probate, and Senior Judge of the Court of Common Pleas.

MATTHEW MAYHEW is supposed to be the one known as Dr. Mayhew, and was grand-son of the first Matthew Mayhew. He is spoken of as a "gentleman of uncommon powers of mind and of exquisite wit and humor." He, like most of the other members of the family, lived to a ripe old age, and died at the age of eighty-five.

JOHN NEWMAN I apprehend belonged to Edgartown, and was settled as a clergyman over the Church in that town in 1747. In 1758, he was dismissed from his connexion with his people, and in 1761, was appointed Judge of this court.

BENJAMIN SMITH belonged to Edgartown, and died December 18, 1738.

Few and brief as have been these notices of the Judges in Dukes County, it perhaps may have already occurred to the reader, that in order constantly to supply the number of four Judges from so small a population it could not be expected that any considerable proportion of them would be men sufficiently distinguished to be preserved in history beyond the records of the Court in which they sat.

Such was the case, and these records no longer existing, the memory of most of them has passed away.

NANTUCKET.

The records of this county do not, I am informed,[1] exhibit the names of the Judges of the Court of Common Pleas.

The first term of this court of which there is any record, was held in 1708, and the last term previous to the Revolution, in March, 1774.

The following are the names of all the Judges whose connexion with this court I have been able to ascertain.

James Coffin was Chief Justice of the court from 1708, to 1712, and the succession of Chief Justices from 1712, to 1754, was as follows, viz:

George Bunker,
Richard Gardner,
George Gardner,
James Coffin,
Josiah Coffin was Chief Justice, from 1754, to 1774.

Among the associate Judges, were
John Coffin and *Joseph Gardner*, appointed in 1732.
Thomas Brock, *Jonathan Coffin*, *Grafton Gardner*, } appointed in 1747.
John Bunker, appointed in 1751.
Caleb Bunker, appointed in 1767.
Obed Hussey, " in 1767.

No business was done by the court after March, 1774, until 1783. But a new organization of it took place in 1775, when Josiah Coffin as Chief Justice, Grafton Gardner, Caleb Bunker and Ebenezer Calef, were commissioned as its Judges, and continued to hold their offices until 1781.

[1] By a communication from George Cobb, Esq., Clerk of the county.

The revival of the court after the Revolution, is thus noticed in its records.

"The Court of Common Pleas having been discontinued from March, 1774, until October 1783, by reason of the war and Revolution in North America; and the war being now happily ended, and America being owned and acknowledged for a sovereign, independent Commonwealth, the court now begin to take place upon the new constitution, and to do business as formerly. May the blessing of Heaven attend North America!

Fred. Folger."

With this transcript of the recorded spirit that was alive in 1775, I must close this very brief notice of the courts of Nantucket before the Revolution, merely adding that previous to the charter of William and Mary, the Island belonged to the jurisdiction of New York, but was united to Massachusetts by that charter.

HAMPSHIRE COUNTY.

By the diligence and disinterested kindness of Samuel Wells, Esq., clerk of the courts in the county of Hampshire, I am able to present a very perfect list of the Judges of the Court of Common Pleas in this county. They are as follows, and the only omission of which I am aware, is in not distinguishing the Chief Justices of the court from their associates.

John Pynchon, from 1692, to 1702.
Peter Tilton, 1692, to 1694.
Samuel Partridge, 1692, to 1740.
Joseph Hawley, 1692, to 1711.
Joseph Parsons, 1698.[1]
John Pynchon, 1708.
Samuel Porter, 1711.[2]

[1] Mr. Parsons belonged to Northampton—He died in 1729.
[2] Mr. Porter was of Hadley. He died in 1722.

John Stoddard, to 1748.[1]
John Ashley, to 1737.[2]
Henry Dwight, to 1731.[3]
Ebenezer Pomeroy, 1735, to 1753,[4]
Eleazer Porter, 1737, to 1757.[5]
Timothy Dwight, 1737, to 1741, and in 1748.[6]
William Pynchon, 2d, 1737, to 1738.[7]
William Pynchon 1st, 1738, to 1742.[8]
Joseph Pynchon, 1741, to 1752.[9]
Ephraim Williams, 1741, to 1749.
Timothy Dwight, 1748, to 1757.[10]
Josiah Dwight, 1750, to 1768.[11]
Joseph Dwight, 1753, to 1761.
Israel Williams, 1758, to 1774.
Timothy Dwight, Jr., 1758, to 1774.[12]
Elijah Williams, 1761 to 1763.[13]

[1] Mr. Stoddard has already been mentioned on page 290.

[2] Mr. Ashley was of Westfield. He died 1759.

[3] Henry Dwight was of Hatfield, died in 1733. Both he and Judge Ashley had been practising attorneys before being made Judges of the court.

[4] Mr. Pomeroy was a member of the Council. He belonged to Northampton, died in 1754.

[5] Mr. Porter belonged to Hadley—was a member of the Council, and died in 1757.

[6] Mr. Dwight was of Northampton. He was admitted as an Attorney in 1721.

[7] Mr. Pynchon was of Springfield, son of John, 3d, who was son of Judge John 2d, and brother of Judge William, 1st, died 1783. He was a practising attorney before he became a Judge.

[8] Mr. Pynchon was son of Judge John, 2d, was of Springfield, born 1703, died 1742.

[9] Joseph Pynchon was also of Springfield, and a member of the Council.

[10] Mr. Dwight was of Northampton, died 1771.

[11] Josiah Dwight was of Springfield, died 1768. Both Timothy and Josiah Dwight were grand-sons of Timothy Dwight of Dedham, having different fathers. They had been practising attorneys before they were appointed Judges.

[12] Mr. Dwight was of Northampton—He died in 1776.

[13] Mr. Williams was of Deerfield. He died in 1771.

Thomas Williams, 1763, to 1774.[1]
Oliver Partridge, 1769, to 1774.[2]

The first court after the Revolution consisted of Timothy Danielson of Brimfield, John Bliss of Wilbraham, Eleazer Porter of Hadley and Samuel Mather of Westfield, the first three of whom were commissioned December 1, 1777, and the last on the 16th January, 1778.

JOHN PYNCHON belonged to Springfield, and his history is identified with the early history of that ancient town. He was long known by the honorary title of "worshipful," and was for many years a member of the Council.

He was the son of William Pynchon, and removed with his father from Roxbury to Springfield in 1636.

Full authority was given to the father to try causes as a Judge, and in 1652, a joint commission was given to John Pynchon and two others, to hear and determine causes that were for trial. This authority existed until 1660, when Hampshire county was incorporated.

The manner in which justice was administered during this time must have been somewhat anomalous in its character. Trials were always by Jury, but there was a disposition manifested to exercise equity powers, and sometimes to the sacrifice of legal forms as well as the rules of law.

Upon the establishment of Courts of Common Pleas under the charter, he was made Chief Justice of this court for the county of Hampshire, which place he held till his death.

He had filled many important places before this appointment. He had represented Springfield in the General Court, had been an assistant under the colony charter,

[1] Mr. Williams, was of Deerfield, son of Ephraim Williams of Stockbridge, before mentioned—He died in 1779.

[2] Mr. Partridge was of Hatfield—he died in 1792.

was one of President Dudley's and Governor Andros' Council, and a Colonel of the Hampshire Regiment.

He was born in England, in 1625, married the daughter of Governor Wyllys of Connecticut, and died January 17, 1703, at the age of 77.

PETER TILTON belonged to Hadley, and was often called "worshipful" on account of the dignity of office and power to which he attained.

He represented that town in the Legislature, and was for seven years a member of the body of Assistants under the Colony charter.

In the discussions about surrendering the charter, Mr. Tilton took a leading part with Major Gookin, Elisha Cooke &c., against yielding at all, to the demands of the crown. He was for adhering to the charter at all events, and leaving the event with Providence. His name is thus intimately associated with the history of the loss of the first charter.

Under the new charter he was made a Judge of the Common Pleas for the county of Hampshire, and remained upon the bench until 1694. He died in the year 1696, having been a member of the Provincial Council.

SAMUEL PARTRIDGE belonged to Hatfield, and was a member of the Council. He was born at Hartford, October 15, 1645, and died at the age of 95, December 25, 1740. He was a member of this court from 1692 to the time of his death, and for a part of the time its Chief Justice. He had been a practising attorney before his elevation to the bench, and was clerk of the court under the Colonial charter.

JOSEPH HAWLEY of Northampton, was the remaining member of the first court of this county under the new charter. He was grand-father of the distinguished lawyer

and patriot, Major Joseph Hawley of Revolutionary memory, whose name I have before referred to in this work.

He remained upon the bench until his death in 1711.

JOHN PYNCHON was of Springfield, and the son of Judge John, who has already been mentioned. He was born October 17, 1647. He married a daughter of the Rev. William Hubbard of Ipswich, the distinguished New England historian. He filled many important offices in his county, among which was that of clerk of the courts, and Register of Deeds. He was appointed Judge of the Court of Common Pleas in 1708, and died April 25, 1721, at the age of 74 years.

EPHRAIM WILLIAMS was born in Newton, and removed to Stockbridge among its earliest settlers. He was the father of the distinguished Colonel Williams, who was the founder of Williams College. He was himself a Colonel in the Militia, and a leading man in the western part of Massachusetts. He died at Deerfield, though the precise time of his death is not preserved in the brief notices of him which remain. He was a member of this court from 1741, to 1749.

JOSEPH DWIGHT was born in Dedham, in 1703, and was graduated at Cambridge, in 1722. He removed to Brookfield where he settled and was admitted to the bar in 1733. In 1743, he was appointed Judge of the Court of Common Pleas for the county of Worcester, and held the office until 1750.

During this time, however, he was engaged in military life, and held the responsible rank of Brigadier General in the memorable expedition against Louisburg, in 1745. He had charge of the artillery on that occasion, and his courage and conduct gained for him the applause and commendation of the army and its commander.

In 1756, he commanded a Brigade of New England

troops, in an expedition against the French in the vicinity of Lake Champlain.

He probably removed to Great Barrington, then in Hampshire County, about the time of his leaving the County of Worcester. In 1753, he was appointed to the bench of Hampshire, and retained the office until the division of the county, when Berkshire became a distinct county.

Upon this taking place, he was commissioned as Judge of the same court in the new county, and also as its Judge of Probate, and held both these offices until his death, June 9, 1765, at the age of 62.

His daughter was the second wife of Judge Sedgwick.

ISRAEL WILLIAMS was the son of the Rev. William Williams of Hatfield, and was born in 1708. He was liberally educated and entered early into public life. He was many years a representative from Hatfield, and afterwards a member of the Council. He was a Judge of Probate for the county of Hampshire, and Chief Justice of the Common Pleas, "in which offices he conducted with that ability and integrity which made him truly respected and a public blessing."

He died in 1788, in the 79th year of his age, from a mortal injury in his head received from a fall.

WORCESTER COUNTY.

The following is believed to be a complete list of the Judges of the Court of Common Pleas in this county. It is taken from the Worcester Magazine, a periodical published in 1825, and 1826.[1]

[1] This magazine was edited and published by William Lincoln, Esq., and the late Christopher C. Baldwin. Its object among other things, was to collect and embody the local history of the county, and the spirit and zeal with which this was pursued did much towards preserving the perishing memorials of the past.

JOHN CHANDLER, 1731, to 1743.
JOSEPH WILDER, 1731, to 1757.
William Ward, 1731, to 1745.[1]
William Jenison, 1731, to 1743.[2]
Joseph Dwight, 1743, to 1753.[3]
Samuel Willard, 1743, to 1753.[4]
Nahum Ward, 1745, to 1762.[5]
Edward Hartwell, 1752, to 1762.[6]
Jonas Rice, in 1753.
JOHN CHANDLER, 1754, to 1762.
Thomas Steele, 1756, to Revolution.
TIMOTHY RUGGLES, 1757, to Revolution.[7]
Joseph Wilder, 1762, to 1773.
ARTEMAS WARD, 1762, to Revolution.

The first Judges commissioned for this court after the commencement of the Revolution were

Artemas Ward, Jedediah Foster of Brookfield, Moses Gill of Princeton, and Samuel Baker of Berlin. Their commission bore date October 17, 1775, and a term of the court was holden December 5, 1775.

JOHN CHANDLER belonged to Woodstock, then a part of the county of Worcester, to which place his father removed from Roxbury. He held many offices of trust and honor, and was distinguished in military as well as civil life. He was successively a Representative in the General Court and a member of the Council. He was a Colo-

In the death of Mr. Baldwin, who was killed by being thrown from a stage coach on a journey in Ohio, in August, 1835, the American Antiquarian Society lost his invaluable services as their librarian, and the cause of antiquarian research a most zealous and devoted friend.

[1] Colonel Ward was of Southboro.
[2] Mr. Jenison belonged to Worcester. He died in 1743.
[3] Mr. Dwight is noticed among the Judges of Hampshire County.
[4] Mr. Willard was of Lancaster.
[5] Mr. Ward belonged to Shrewsbury.
[6] Mr. Hartwell belonged to Lunenburg.
[7] Chief Justice Ruggles has already been mentioned, (page 226.)

nel of a Regiment of the militia, besides being Chief Justice of the Court of Common Pleas and Judge of Probate. He held these several offices at the time of his death, which took place in 1743.

He was the father of Judge John Chandler of Worcester, who will be further noticed.

Joseph Wilder belonged to Lancaster, and, on the decease of Judge Chandler, succeeded him as Chief Justice of this court. He was also his successor in the office of Judge of Probate. He was the father of Judge Joseph, who was upon the bench of this court from 1762, till the Revolution.

He often represented Lancaster in the General Court, and sustained other public trusts with ability and honor. He died March 29, 1757, aged 74.

Jonas Rice, as I learn from Mr. Lincoln's History of Worcester, removed to that town from Marlboro', and was one of its earliest settlers. Two attempts to settle the town having failed by reason of the attacks of the Indians upon the few white settlers, a new attempt was made in 1713. Mr. Rice, "who had been a planter during the second settlement, returned October 21, 1713." I have transcribed from the work already referred to, the following account of this gentleman, whose qualifications for the place of Judge seem not to have consisted in legal knowledge or professional skill.

"He remained with his family alone in the forest, the solitary inhabitant of Worcester, until the spring of 1715. The union of cool intrepidity and firmness, with good sense and integrity in the character of Mr. Rice, commanded the respect and secured the confidence of his fellow citizens when the town he had founded, rose from its ashes in renovated beauty, to commence that steady progress of prosperity which has brightened its advance.

He was often elected to municipal offices, was frequently representative to the General Court, and was one of the Justices of the Court of Common Pleas at the time of his decease, September 22, 1753, at the age of 84 years."

JOHN CHANDLER was the son of Judge Chandler already mentioned. He belonged to Worcester. He was born at Woodstock, October 10, 1693, and removed to Worcester in 1731. From that time he was clerk of the courts and register of probate, till 1754, and register of deeds till 1762. In 1751, he was appointed Sheriff of the county, and held the office eleven years.

He represented the town of Worcester, many years in the General Court, and, on the decease of his father, succeeded to the offices of Colonel of the Militia and member of the Council.

He succeeded Judge Wilder as Judge of Probate, and was succeeded by his own son, in 1762.

"His talents," says Mr. Lincoln, "were rather brilliant and showy, than solid or profound. With manners highly popular, he possessed a cheerful and joyous disposition, indulging in jest and hilarity, and exercised liberal hospitality. While Judge of Probate, he kept open table on court days for the widows and orphans who were brought to his tribunal by concerns of business. He died at Worcester in 1763."

THOMAS STEELE was a native of Boston, from which place he removed to Leicester, where he spent the remainder of his days. He was graduated at Cambridge, in 1730, and was a class-mate of Chief Justice Oliver. He was bred a merchant and pursued that business both before and after leaving Boston. He was a loyalist in his politics, and a man of influence until the period of the Revolution. He frequently represented the town of

Leicester, in the General Court, and was much respected by his fellow citizens, as a man of integrity.

JOSEPH WILDER was of Lancaster, and a son of Chief Justice Joseph, already mentioned. He represented that town in the General Court eleven years, and died April 20, 1773, aged 65. He is said to have been, in connexion with his brother, the first in America, who established pot and pearl ash works.

He held the office of Judge until his death, and no appointment seems to have been made to supply the vacancy thereby created, before the Revolution.

ARTEMAS WARD. For the sketch of the life of this distinguished man, I have principally referred to Elliot's Biographical Dictionary. It is to be hoped that some one will yet do justice to the memory of one of the earliest and bravest of the patriots of the Revolution, by a suitable biography of General Ward.

He was a native of Shrewsbury, and was graduated at Harvard College, in 1748.

He early entered into public life, and represented his native town in the Legislature. At a later period he was chosen to the Council, and was one of the number regularly chosen, who were displaced by the appointment of the Mandamus Counsellors, in 1774. He was a member of the first Provincial Congress, and took a leading part in its transactions.

He had obtained a good military reputation before the difficulties with the mother country broke out into a war, and at the organization of an army by the Provincial Congress, in 1775, he was appointed Commander in Chief of the forces. He held this rank on the memorable 17th June, when the battle of Bunker Hill was fought, and continued at the head of the army until the arrival of General Washington, at Cambridge.

He was appointed Senior Major General of the army, by the Continental Congress, but resigned his place soon afterwards, although he continued in the service for some time after his discharge.

After leaving the army he still continued in public life. In 1788, he was a member of the executive Council of the Commonwealth, and in 1791, was chosen a representative in the Congress of the United States.

Through all these changes he seems to have retained his connexion with the Court of Common Pleas, while that court had an existence. He was appointed its Chief Justice, in October, 1775, and retained the place until his resignation of office, in 1798.

His conduct in the office of Chief Justice, during the excitement known as "Shay's rebellion," in 1786, is deserving of particular and most honorable commemoration. It cannot be given in a better manner than in the graphic and spirited language of the historian of Worcester already referred to. An armed band under Captain Wheeler had taken possession of the Court House and the hill on which it stood. The Judges, Clerk and Sheriff, were proceeding towards the court house at the regular hour of convening the court.

"On the verge of the crowd thronging the hill, a sentinel was pacing on his round, who challenged the procession as it approached his post.

General Ward sternly ordered the soldier, formerly a subaltern of his own particular regiment, to remove his levelled musket. The man, awed by the voice he had been accustomed to obey, instantly complied and presented his piece in military salute to his old commander. The court having received the honors of war from him who was planted to oppose their advance, went on. The mul-

titude receding to the right and left, made way in sullen silence till the judicial officers reached the court house.

On the steps was stationed a file of men with fixed bayonets. On the front stood Captain Wheeler with his drawn sword. The crier was directed to open the doors, and was permitted to throw them back, displaying a party of infantry with their guns levelled as if ready to fire. Judge Ward then advanced and the bayonets were turned against his breast. He demanded, repeatedly, who commanded the people there, by what authority and for what purpose they had met in hostile array. Wheeler, at length, replied: after disclaiming the rank of leader, he stated that they had come to relieve the distresses of the country by preventing the sittings of the courts until they could obtain redress of grievances. The Chief Justice answered that he would satisfy them their complaints were without just foundation. He was told by Captain Smith of Barre, that any communication he had to make must be reduced to writing. Judge Ward indignantly refused to do this, he said, he did not value their bayonets —they might plunge them to his heart, but while that heart beat, he would do his duty, when opposed to it his life was of little consequence; if they would take away their bayonets and give him some position where he could be heard by his fellow citizens, and not by the leaders alone, who had deceived and deluded them, he would speak, but not otherwise. The insurgent officers, fearful of the effect of his determined manner on the minds of their followers, interrupted. They did not come there, they said, to listen to long speeches, but to resist oppression, they had the power to compel submission, and they demanded an adjournment without day. Judge Ward peremptorily refused to answer any proposition unless it was accompanied by the name of him by whom it was

made. They then desired him to fall back, the drum was beat and the guard ordered to charge. The soldiers advanced until the points of their bayonets pressed hard upon the breast of the Chief Justice, who stood as immoveable as a statue, without stirring a limb, or yielding an inch, although the steel in the hands of desperate men penetrated his dress. Struck with admiration by his intrepidity and shrinking from the sacrifice of life, the guns were removed, and Judge Ward ascending the steps, addressed the assembly," in a speech of nearly two hours in length.

No immediate effect was produced by this address, but the conduct of the Chief Justice could not fail to impress the multitude with a deep sense of the dignity and majesty of the law, when represented by the purity, intelligence and moral courage of its accredited ministers. The attempt to arrest the course of the administration may not be repeated in this commonwealth, but the lesson of experience taught in the ill-judged and ill-fated insurrection of 1786, ought not to be lost upon those whose rights and liberties so essentially depend upon the preservation of our civil institutions.

Judge Ward survived the resignation of his office about two years, during which he was sinking under the slow progress of disease. He died after a long decline, October 28, 1800, at the age of 73 years, leaving the rich inheritance of an unblemished character as a man, and of incorruptible integrity as a Judge.

BERKSHIRE COUNTY.

I am indebted for the following list of Judges, and, principally, for the few brief sketches of them which follow, to the history of Berkshire County, prepared and published by "gentlemen in the county," in the year 1829.

This county, it will be recollected, was incorporated in 1761, having before that period belonged to the county of Hampshire. Of course only a few in number had filled the place of Judges of its courts, previous to the Revolution. The business of the courts in this county was suspended from 1774 to 1780.

The first court consisted of

JOSEPH DWIGHT, who continued upon the bench till 1765.[1]
WILLIAM WILLIAMS, " to Revolution.
Timothy Woodbridge, " to Revolution.
John Ashley, 1765, to Revolution.
Perez Marsh, 1765, to Revolution.

WILLIAM WILLIAMS succeeded Judge Dwight as Chief Justice of the court, and retained the place till the Revolution. He was also Judge of Probate for this county. After the Revolution he was re-appointed to the place of Chief Justice of the Court of Common Pleas, which office he held until 1781.

He belonged to Pittsfield, and was one of the earliest settlers of that beautiful town. He often represented the town in the legislature. His death occurred April 5, 1788, at the age of 75.

TIMOTHY WOODBRIDGE deserves a place in this work, not only on account of his connection with the courts of the county, but for his devotion to the cause of humanity in his endeavors to educate and christianize the native tribes which continued to reside in the vicinity of Stockbridge, till a comparatively recent period. Mr. Woodbridge commenced a school for this purpose in Stockbridge in 1734, and continued it for many years, when he was succeeded by Mr. Sargeant, who sustained it until the removal of the tribe to the western part of New York.

[1] Judge Dwight has already been noticed.

Mr. Woodbridge was, during this time, the agent and superintendent of the Indian affairs in this region.

He was named as one of the Mandamus Counsellors, but refused to accept the appointment. He was a man of superior attainments, and of great influence in the county.

He died May 11, 1774, at the age of 65 years, leaving a son Enoch, who has since been Chief Justice of the superior Court of Vermont.

JOHN ASHLEY was born in Westfield, and is supposed to have been a son of Judge Ashley of that town already mentioned. He was graduated at Yale College in 1730, and was admitted to the bar in 1732, when he settled in Sheffield where he ever after resided. He was a leading and influential man, and possessed great wealth. He continued upon the bench of the Court of Common Pleas, with the interval of the suspension of the courts at the Revolution, till 1781. He was known as Colonel Ashley, in distinction from his son John, who was Major General of the Berkshire Division of the militia, and distinguished himself during the Shays rebellion in dispersing the insurgents in that county.

Judge Ashley, died September 1, 1803, at the advanced age of 93.

PEREZ MARSH belonged to Dalton, and was one of the early settlers of that town. He was a graduate of Harvard, in 1748, and was a physician by profession.

The sessions of this court were very summarily arrested by the people, who collected in such numbers at its regular term in the summer of 1774, as to fill the court-house so completely that no admission could be had for the Judges. The Sheriff made proclamation for them to disperse and make way for the court, but they gave him to understand, they recognized no court but such as ob-

served the ancient laws and usages of the country, and paid no heed to his command.

I do not find that any new commissions to Judges of this court were issued until February 16, 1779, when John Ashley of Sheffield, John Bacon of Stockbridge, William Whiting of Great Barrington, and John Brown, I suppose of Pittsfield, were appointed.

This closes the notices of the Judges of the Court of Common Pleas during the existence of the Provincial Charter. They have been, it is true, in most instances exceedingly meagre, and the reason of this has been more than once alluded to. Many who held these offices were scarcely known beyond their connexion with the courts, and in several of the counties, there are from various causes defects in their records which prevent the inquirer from fully tracing even the names of the Judges who have held their courts.

This defect may be supplied only by recurring to the local histories of the several towns in the commonwealth, most of which, however, are yet to be written in order to be accessible.

It would be a pleasant task to trace the history of these courts through the various modifications through which they have passed under the constitution of the commonwealth. As the importance of a learned and independent Judciary has become better understood, the jurisdiction of these courts and the qualifications required in their Judges have been proportionately elevated, till, under their present constitution, the public have a tribunal in every way adequate to determine the interesting and important questions of private right and public police, which arise in a populous, refined and wealthy community like our own. It is left however for a future work, or an abler pen, to perform this

task, while I am obliged to content myself with such gleanings of an earlier period as time and opportunity have enabled me to gather into these Sketches of our Judicial History.

I cannot take leave of this subject however, without again expressing the hope that some one will be found to do more ample justice to it than I have been able to do. It was a well nigh untrodden field, and the most that can be claimed for this work is that it may serve as a pioneer to future explorers.

The importance of a work which shall embody the history of the courts, the forms of legislation and the modes of administering justice in Massachusetts, must be obvious upon a moment's reflection. When so many crude and sophistical notions are advanced upon the subject of making, interpreting and administering laws, by professed reformers, it is well to draw lessons of wisdom from past experience for the guidance of the public mind in detecting the selfish purposes of artful and designing men, or the errors and false views of honest but mistaken minds.

There have been, ever since the establishment of our government, a class of politicians who have decried the independence of the judiciary as anti-republican in principle, and as a feature in our constitution which ought to be modified. Whatever may be thought of the propriety of limiting the tenure of Judicial office to a certain age in the incumbent, the importance of having tribunals of justice independent of the passions, prejudices, and biases which always have influenced and always will influence and control free communities, at times, cannot be better illustrated than by a faithful history of the judiciary of our own commonwealth.

On review of this, we are carried back to the period of our Colonial Charter, when popular election limited the

tenure, and popular favor was the test of qualification for office.

We look at the administration of justice during this period, and find it, at best, little better than legislation adapted to individual cases.

If life, liberty and property were then secure, it was rather through the influence of a strong, pervading moral sense which then controlled the public mind, than the well settled rules of civil rights and duties which distinguish the condition of a free people.

Passing from this period, we find a new era opening upon the view, in a judiciary independent, indeed, of the popular will, but deriving its appointment from a royal governor, and holding office substantially during his pleasure. Under such a constitution, although more uniformity and greater stability might naturally be expected in the administration of the law, the citizen was taught by sad experience how slender was the protection afforded him in the improved forms of Justice, when his interests were opposed to those of the ruler. He sued in vain to a tribunal that owed its existence to the power against whose interest he was contending.

The framers of the constitution of Massachusetts, whose sturdy love of liberty had been strengthened and disciplined in the school of the revolution, knew the value of personal security to the citizen too well to suffer it to depend upon the fluctuating will of the many or the caprice of the few.

And we find that in the very "Declaration of Rights" prefixed to the Constitution, this right of being tried by impartial and independent judges is solemnly guarantied to the citizens of the commonwealth.

And the history of the results of the adoption of this principle, would show how far the peace and good order

of the community, as well as individual safety and general confidence, have been the fruits of such a system. The citizen has found that so far as his interests have been brought under judicial examination, he has, in the language of this Bill of Rights, been "tried by Judges as free, impartial and independent as the lot of humanity will admit."

Another scarcely less obvious inference may fairly be drawn from the history of these several eras in the constitution of our courts, and that is that an enlightened, intelligent and independent BAR is scarcely less essential to a just administration of the law, than an independent Bench. Indeed, without such a Bar, it would be idle to hope for an enlightened and educated Bench. The one becomes the only proper school of preparation for the other.

Besides, without such a Bar, to stand as a medium of connexion between the Bench and those who come before it in the relation of suitors, justice could be but partially administered. The cunning, knavish litigant would successfully practice his arts upon the honest suitor with whom he should contend, and the undisciplined feelings of disappointed or unsuccessful parties would find vent in such a manner as to convert our courts of justice into arenas in which personal rancour would trample upon the courtesies of life, and popular vengeance too often take the law into its own hands.

These topics have already been alluded to more than once in the course of this work, and to reflecting minds no argument is needed to enforce them. I have however again referred to them in the hope of thereby presenting a proper incentive to ingenuous minds to enter this field of historical research, and to complete what has been so imperfectly begun.

It was the wish of Giles Duncomb, that his Treatise upon "Trials per Pais," "might not be read of the most learned, nor of those who are not learned at all, because these understand nothing and the others more perhaps than the author himself."

However wise might be such a wish in an author who should write for his own fame alone, I cannot but indulge the hope that these pages may find readers who will be far more able to make use of the facts here collected than I have been.

The legal profession is not what it once was in our Commonwealth. Law is no longer regarded as a mere art or trade. As a moral and political science it has taken its place by the side of the most exalted and important of human sciences, and whatever shall tend to diffuse a true estimate of its pursuit through the community, may be accounted as something added to the stock of useful knowledge, though it may not wear the attractive garb of ingenious speculation or of a polished style.

Massachusetts has been a distinct community long enough to have accumulated many of the elements of an unwritten or common Law of her own. And these must be traced in the fading memorials of an earlier age—in the origin of those institutions, social and political, which grew up to meet the expanding wants of a young and vigorous Commonwealth.

Whatever, therefore, may be the form in which these memorials are preserved, be it even in the dry details of legislative enactments, they cannot fail to be useful to any one who would pursue the study of our law as a science, or seek to give to its elements the form and symmetry of a rational system.

Narrow as has been the sphere of these labors, I cannot

better conclude this work than by borrowing the eloquent language of Mr. Burke, when speaking of the history of the English law. "What can be more instructive than to search out the first, obscure and scanty fountains of that jurisprudence which now waters and enriches whole nations with so abundant and copious flood—to observe the first principles of RIGHT springing up, involved in superstition and polluted with violence; until by length of time and favorable circumstances, it has worked itself into clearness,—the laws, sometimes lost and trodden down in the confusion of wars and tumults, and sometimes overruled by the hand of power; then victorious over tyranny; growing stronger, clearer, and more decisive by the violence they had suffered; softened and mellowed by peace and religion; improved and exalted by commerce, by social intercourse, and that great opener of the mind, ingenuous science?"

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[1] When preparing the body of this work, I had hoped to learn something of the life and character of Mr. Reed, but found myself disappointed in being able to furnish any further notice of him, although it was promised in the work.

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